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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 460

NEW ORLEANS PUBLIC SERVICE, INCORPORATED, APPELLANT,

vs.

CITY OF NEW ORLEANS

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED OCTOBER 25, 1929

(34,591)

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IN CIVIL DISTRICT COURT OF ORLEANS PARISH, DIVISION "C"

No. 172,248, Docket 5

CITY OF NEW ORLEANS

vs.

NEW ORLEANS PUBLIC SERVICE, INC.

PETITION FOR MANDATORY INJUNCTION—Filed December 13, 1927

To the Honorable Judges of the Civil District Court in and for the Parish of Orleans:

The petition of the City of New Orleans, a municipal corporation created by Act No. 159 of the Session of the General Assembly of the State of Louisiana for the year 1912, and amendatory acts thereof, herein represented by and acting through Arthur J. O'Keefe, the Mayor thereof, by virtue of the authority vested in him by motion of the Commission Council of this City, duly adopted at a meeting thereof on November 2nd, 1927, a certified copy whereof is hereto attached and made part of this petition and marked Exhibit "1," with respect represents and shows:

I

That the New Orleans Public Service, Inc., a corporation organized under the laws of this State and domiciled in this City, has been for some years past and is presently operating street railway lines in the City of New Orleans, [fol. 2] and more particularly along Franklin Avenue and across the intersecting streets thereof from a point beginning at Dorgenois street and terminating at L. N. Crossing, and more particularly across Florida Walk, which is traversed by several railroad lines leading into and out of the City of New Orleans, with their accessory switch tracks.

II

That the franchise to operate said street railway line, as above set forth, was originally granted to corporations operating in this City by the City Council. That the New Orleans Railway and Light Company acquired certain rights and interests in said franchises, which rights, privileges and interests were subsequently acquired by the New Orleans Public Service, Inc., by virtue of certain ordinances adopted by the Commission Council of this City, as will be more fully shown upon the trial of this cause.

III

That prior to the acquisition of any right, title or interest in any franchises by the New Orleans Public Service, Inc., the City Council of the City of New Orleans adopted an ordinance shown as Ordinance No. 6445, New Council Series, which said ordinance directed and required the New Orleans Railway and Light Company to construct, subject to the approval of the City Engineer, a viaduct approximately in the center of Franklin Avenue, at and in the vicinity of the Florida Walk intersection, the said viaduct to embrace earthern embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways on the said avenue, all as will more fully appear by reference to a certified copy of said Ordinance No. 6445 N. C. S., hereto annexed and made part of this petition, and marked Exhibit "2" for the purpose of identification.

IV

Your petitioner avers that the New Orleans Public Service Inc., acquired all the rights, interest and privileges of the New Orleans Railway and Light Company under the aforesaid ordinance, and became responsible for all of the duties and obligations originally imposed by the said ordinance on the grantee thereof, the New Orleans Railway and Light Company, which said original grantee constructed the said viaduct and operated and maintained the same up to the time that its rights, interests and privileges there-

under were acquired by the New Orleans Public Service, Inc.

[fol. 3]

V

Your petitioner now avers and shows that the said viaduct, ordered and directed to be constructed under the terms and conditions of the aforesaid Ordinance No. 6445 N. C. S., was not constructed in accordance with the provisions of the said ordinance, and the same has been maintained and operated in direct violation thereof.

VI

Your petitioner now avers and shows that in addition to the fact that the said viaduct was not originally constructed in accordance with the terms and conditions of the said ordinance, that the said viaduct has deteriorated, and has not been maintained in a safe and proper manner, and the use thereof has become dangerous to the public of the City of New Orleans.

VII

That your petitioner further avers and shows that the said viaduct, as constructed, permits of the construction of but one street car track thereon, which said street car line is insufficient for the requirements and needs of the present population obtaining and receiving street railway service in that section.

VIII

That at the time of the adoption of Ordinance 6445, N. C. S., the section of the City served by the said street car line traversing said viaduct was sparsely inhabited. That since the adoption of the said ordinance, that area or portion of the City has rapidly developed and has now become one of the thickly populated sections of the City, where property is enhancing in value, and which now requires more adequate street car transportation for the inhabitants thereof, which cannot possibly be provided with the one line operated by the New Orleans Public Service, Inc., over and across the aforesaid viaduct.

IX

Your petitioner further avers and shows that because of the present dangerous and unsafe condition of the said viaduct, across which the New Orleans Public Service, Inc., operates its lines, the people of New Orleans desiring and requiring transportation service in that section are afraid to use the said street car line. That it is generally accepted and known that the said viaduct is dangerous and unsafe, and such fact has militated against the earnings of the said street car line and the City of New Orleans, being, under the settlement ordinance, No. 6822, C. C. S., vitally interested in the earnings of the said Railway Company, it is to the interest and advantage, both of the said [fol. 4] Public Service Inc., and the City of New Orleans, that said viaduct be demolished and removed so as to permit of the safe construction and operation of the said street car lines, thus bringing about a material increasing earning therefrom.

X

Your petitioner further shows and avers that the said viaduct, constructed under the terms and provisions of Ordinance 6445, N. C. S., eliminates a grade crossing at the Southern Railway tracks, but at the terminus of the said viaduct the street car line passes over a serio*u*-s of tracks owned and operated by the Louisville and Nashville Company at grade crossing.

XI

That the said viaduct therefore fails to provide any real protection against any dangers that might be encountered by reason of grade crossings. That to eliminate a grade crossing over the tracks of the Louisville and Nashville Railroad Company, it will be necessary to demolish the present viaduct and to construct a new viaduct extending across both the Southern Railroad Company's tracks and the Louisville and Nashville Railroad Company's tracks, and would have to provide a viaduct of such size and construction as would permit of the construction across the same of two or more street railway tracks, and two

roadways for vehicular traffic, as well as provision for a foot path for pedestrians. That the construction of such a viaduct would necessitate the expenditure of a very large amount of money, of which the City would have to contribute, under Act 38 of 1924, one-half the cost of such construction. That the City is not financially able, at this time, to contribute so large an amount out of its alimony, and in order to afford the proper service to its citizens, and in order to eliminate the dangerous condition of the said viaduct which may at any time cause serious personal injury to the persons using the same, or to persons in the neighborhood thereof, the Commission Council of this City, in the exercise of the discretion vested in it, has decided to direct and order the demolition and removal of the said viaduct.

XII

That in pursuance with its duties, and in order to legally cause the dolition and removal of the said viaduct by the New Orleans Public Service Inc., the Commission Council of the City of New Orleans, on November 16th, 1926, adopted Ordinance No. 9375, C. C. S., directing and ordering the demolition and removal of the said viaduct by the New Orleans Public Service, Inc., and further directing and [fol. 5] requiring said Public Service Corporation to construct, operate and maintain a double line of tracks along Franklin Avenue and across Florida Walk, according to plans and specifications to be furnished by the said New Orleans Public Service, Inc., and approved by the Commissioner of Public Utilities and the City Engineer of this City, all of which more fully appears by reference to a duly certified copy of the aforesaid ordinance, hereto annexed and made part hereof, and marked Exhibit "3" for identification herewith.

XIII

Your petitioner further avers and shows that by the terms and conditions of said Ordinance C. C. S., the demolition and removal of the said viaduct was ordered completed within one year from the date of the adoption of the said ordinance. That the year has now expired and

no action whatsoever has been taken or is contemplated by the New Orleans Public Service, Inc., so far as your petitioner is advised or knows, toward a compliance with the terms and provisions of said ordinance. But on the contrary, your petitioner is advised and believes, and hence avers, that it is the intention of the said New Orleans Public Service, Inc., to ignore the said Ordinance No. 9375 C. C. S., and to decline and refuse to comply with the terms and conditions thereof.

XIV

Your petitioner further avers and shows that the New Orleans Public Service Inc., has neglected, failed and refused to submit plans and specifications provided for in the aforesaid Ordinance 9375 C. C. S., and to the Commissioner of Public Utilities and the City Engineer for their consideration and approval.

XV

Your petitioner now avers and shows that the Commission Council of the City of New Orleans is vested with full and complete authority and control over the streets, and has full power, authority and control to regulate the operation of the public service corporation of the city, and more particularly the street railway lines operated by the New Orleans Public Service, Inc., under and by virtue of the police power of the City of New Orleans, and by virtue of the authority and power vested in it by the laws and ordinances of this State and City, and that in the exercise of such power and its discretion therewith, it has ordered and directed the work aforesaid, as set [fol. 6] forth in said Ordinance 9375, C. C. S.

XVI

That your petitioner further avers and shows that the New Orleans Public Service, Inc., has neglected, failed, declined and refused to carry out the mandate and orders of the Commission Council of this City and of the Commissioner of Public Utilities, and in order to enforce compliance with the said ordinance and to afford the nec-

essary and proper protection and relief as hereinabove stated to the citizens of New Orleans, it is proper that a writ of injunction issue herein, directing, ordering and requiring the New Orleans Public Service, Inc., through its proper officer, to immediately demolish and remove the said viaduct constructed under and by virtue of Ordinance 6445 N. C. S., the removal of which was directed and required by Ordinance 9375, C. C. S., That the said New Orleans Public Service, Inc., be further ordered, directed and commanded to submit plans and specifications as provided for by Ordinance 9375, C. C. S., within thirty days from the date of judgment rendered in this cause, and in default of compliance with such order that the City Engineer will be authorized to prepare the proper and necessary plans and specifications and to require the New Orleans Public Service, Inc., to construct, operate and maintain a double line of tracks along Franklin Avenue and across Florida Walk, according to such plans as may be prepared by the said City Engineer, duly approved by the Commissioner of Public Utilities.

XVII

Your petitioner further avers and shows that the City is compelled to resort to the proceedings herein taken, as it has no other adequate or suitable remedy at law, and that the proceedings herein taken are in the interest of and on behalf of the public, and that a writ of injunction is therefore necessary and proper in the premises.

XVIII

Your petitioner avers that the City of New Orleans is by law dispensed with the necessity of furnishing bond in any judicial proceedings, and that a writ of injunction should issue without the usual requirement of bond.

Wherefore, petitioner prays that the New Orleans Public Service, Inc., through its proper officer, be duly cited to appear and answer this petition; that after due hearing and trial thereof, that there be judgment in favor of your petitioner, the City of New Orleans, and against the New [fols. 7 & 8] Orleans Public Service, Inc., the defendant

ordering, directing and commanding the said New Orleans Public Service, Inc., to forthwith and immediately dismantle, demolish and remove the viaduct heretofore constructed and operated under the terms and conditions of Ordinance 6445, N. C. S., and ordered dismantled and removed by Ordinance 9375, C. C. S., that the said New Orleans Public Service Inc., be further directed, ordered and commanded to submit to the Commissioner of Public Utilities and the City Engineer for their approval, within thirty days from date of judgment herein, plans and specifications for the construction, operation and maintenance of a double line of tracks along Franklin Avenue and across Florida Walk, and in default of its so doing, that the City Engineer be authorized, empowered and directed to prepare the proper plans and specifications for the construction of such tracks, subject to the approval of the Commissioner of Public Utilities and the New Orleans Public Service, Inc., be ordered, directed, and commanded to immediately thereafter construct, and to subsequently operate and maintain the said double line of tracks along Franklin Avenue and across Florida Walk, in lieu of the one now operated across the said viaduct, and your petitioner further prays that in the event the New Orleans Public Service Inc., should fail, neglect or refuse to construct a double line of tracks, as herein requested, according to the plans and specifications of their engineer, or in accordance with such plans and specifications of the City Engineer of New Orleans, duly approved by the Commissioner of Public Utilities, then and in that event the City of New Orleans be authorized and empowered by judgment of this Court to construct such double line of tracks for the use of the said New Orleans Public Service, Inc., and to recover from the said Public Service Inc., the cost thereof.

Your petitioner further prays for all needed and necessary orders, and for general and equitable relief.

(Sgd.) Bertrand I. Cahn, City Attorney (Trial Atty). (Sgd.) Wm. F. Conkerton, Assistant City Attorney.

Duly sworn to by Arthur J. O'Keefe. Jurat omitted in printing.

[fol. 8-a] EXHIBIT NO. 3 TO PETITION

ORDINANCE NO. 9375, COMMISSION COUNCIL SERIES

Mayoralty of New Orleans, City Hall, Nov. 17, 1926

Calendar No. 9709. No. 9375, Commission Council Series

An ordinance directing and requiring the New Orleans Public Service, Inc., to dismantle and remove the viaduct heretofore erected and maintained by it under and by virtue of Ordinance 6445, New Council Series and authorizing and directing the New Orleans Public Service Inc., to construct operate and maintain a double line of tracks along Franklin Avenue and across Florida Walk, according to the plans and specifications to be furnished by the New Orleans Public Service, Inc., and approved by the Commissioner of Public Utilities and the City Engineer.

Section 1. Be it ordained by the Commission Council of the City of New Orleans that the New Orleans Public Service Inc., be and it is hereby directed, authorized, required and instructed to forthwith remove the viaduct across Florida Walk along Franklin Avenue, heretofore constructed and operated under and by virtue of Ordinance 6445, New Council Series.

Section 2. Be it further ordained, etc., that the said New Orleans Public Service, Inc., be and it is hereby ordered, directed and required to construct, operate and maintain a double line of tracks for the operation of its cars, at street level, along Franklin Avenue and across Florida Walk, said tracks to be constructed in accordance with the plans and specifications to be prepared and furnished by said New Orleans Public Service, Inc., and approved by the Commissioner of Public Utilities and the City Engineer of this City.

Section 3. Be it further, ordained, etc., that the work of dismantling and removing the aforesaid viaduct along Franklin Avenue and across Florida Walk shall be completed within one year after the passage of this Ordinance.

Section 4. Be it further ordained, etc., that in the event any phrase, sentence, clause, paragraph or section of this

ordinance shall be held unconstitutional, such unconstitutionality shall not in any wise or in any manner affect the other portion of said ordinance, which shall remain in full force and effect.

[fol. 8b] Adopted by the City Council of the City of New Orleans, Nov. 16, 1926.

Thomas J. Hill, Clerk of Commission Council.

Approved Nov. 17th, 1926. A. J. O'Keefe, Mayor.

A True Copy. Alf Dutel, Acting Secretary to the Mayor.

Clerk's Office, Commission Council, New Orleans, City Hall

Nov. 17, 1927.

I hereby certify the above to be a true and correct copy of Ordinance No. 9375 Commission Council Series, as officially promulgated and on file in Ordinance Book in this office.

(Sgd.) W. P. Brand, Asst. Clerk of Commission Council.

[fol. 9] In Civil District Court of Orleans Parish

[Title omitted]

Answer—Filed October 19, 1928

Now into court, through its undersigned counsel, comes New Orleans Public Service Inc., made defendant in the above entitled and numbered cause, and reserving the benefit of the exceptions heretofore filed herein and without waiving or in any manner abandoning the same, for answer to plaintiff's petition says:

I

Answering Article I of plaintiff's petition, defendant admits that it is a corporation organized under the laws of this State and domiciled in this city and has been for some years past and is presently operating street railway lines in the city of New Orleans and more particularly along

Franklin Avenue, but not as set forth in plaintiff's petition; that its said street railway lines along Franklin Avenue extend from Almonaster Avenue to Dreux Avenue a distance of approximately thirty squares, and that the viaduct referred to in said petition, with its approaches, extends from North Dorgenois street to Agriculture Street, which latter street is near the Louisville and Nashville Railroad Company crossing.

II

Answering Article II of plaintiff's petition, defendant avers that the franchise to operate said street railway lines on Franklin Avenue was granted to New Orleans Railway & Light Company under and by virtue of the terms of Ordinance No. 6032, N. C. S., of the Council of the City of New Orleans, adopted July 27, 1909, and which said franchise was subsequently acquired by this defendant by Special Master's Deed, dated September 27th, 1922, in the matter of New York Trust Company vs. New Orleans Railway & Light Company, No. 16953, In Equity (Consolidated Cause), in the United States District Court for the Eastern District of Louisiana.

III

[fol. 10] Answering Article III of plaintiff's petition, defendant admits the allegations therein contained.

IV

Answering Article IV of plaintiff's petition, defendant admits the allegations therein contained.

V

Answering Article V of plaintiff's petition, defendant denies the allegations therein contained and avers that, notwithstanding defendants filed an exception of vagueness and argued to the court that plaintiff should be directed to show in what way said viaduct was not constructed in accordance with the provisions of Ordinance No. 6445 and in what way the same has been maintained and operated in

direct violation thereof, which exception was overruled, plaintiff does not state in what way the said viaduct was not constructed in accordance with the provisions of said ordinance, and in what way the same has been maintained and operated in direct violation thereof; that defendant does not know and has no means of knowing to what alleged failures of construction, maintenance, or operation the allegations of said petition refer, since the said petition does not state same; and defendant expressly denies that the viaduct was not constructed in accordance with the provisions of the said ordinance or that the same has been maintained and operated in direct violation thereof but, on the contrary, avers that said viaduct was constructed in accordance with the provisions of said ordinance, and that there has never been any complaint on the part of the City that said viaduct was not constructed in accordance with the said ordinance or that the same had been maintained or operated in violation thereof.

VI

Answering Article VI of plaintiff's petition, defendant denies the allegations therein contained and avers that, notwithstanding by the aforesaid exception of vagueness defendant endeavored to have petitioner specify in what way the said viaduct has deteriorated and had not been maintained in a safe and proper manner and the use thereof had become dangerous to the public, plaintiff has failed to furnish such information or to so specify and defendant does not know and has no means of knowing to what these allegations refer. Defendant denies, however, that said viaduct has deteriorated, that it has not been maintained in a safe and proper manner and that the use thereof has become dangerous to the public of the City of New Orleans. On the contrary, defendant avers that the [fol. 11] said viaduct has been kept in proper condition, that it has been maintained in a safe and proper manner, and that the use thereof is not dangerous to the public of the City.

VII

Answering Article VII of plaintiff's petition, defendant admits that the viaduct, as constructed, permits of the con-

struction of but one street car track thereon; but defendant denies that said street car line is insufficient for the requirements and needs of the present population obtaining and receiving street railway service in that section. On the contrary, defendant avers that said street car line is and has always been entirely sufficient for the requirements and needs of the present population obtaining and receiving street railway service in that section.

VIII

Answering Article VIII of plaintiff's petition, defendant denies the allegations therein contained.

IX

Answering Article IX of plaintiff's petition, defendant denies the allegations therein contained.

X

Answering Article X of plaintiff's petition, defendant admits the allegations thereof, but avers that a grade crossing at the Southern Railway Company crossings would be over eight tracks with main line and switching operations more or less continuous at all times, whereas at the Louisville and Nashville Railroad Company crossing there are only three tracks, two main line tracks and one switch track, with very little switching and operation of cars, and that this was substantially the same condition that existed in 1910, at the time when the viaduct was ordered to be constructed under Ordinance No. 6445, N. C. S.

XI

Answering Article XI of plaintiff's petition, defendant denies the allegations therein contained.

XII

Answering Article XII of plaintiff's petition, defendant admits the allegations therein contained.

XIII

Answering Article XIII of plaintiff's petition, defendant admits the allegations therein contained, but defendant

avers that its failure to comply with the terms of said or-
[fol. 12] dinance is for the reasons and justification hereinafter set forth.

XIV

Answering Article XIV of plaintiff's petition, defendant admits the allegations therein contained, but defendant avers, that its failure to comply with the terms of said ordinance is for the reasons and justification hereinafter set forth.

XV

Answering Article XV of plaintiff's petition, defendant avers that said Article merely states a conclusion of law which defendant is not required to answer.

XVI

Answering Article XVI of plaintiff's petition, defendant denies the allegations therein contained.

XVII

Answering Article XVII of plaintiff's petition, defendant denies the allegations therein contained.

XVIII

Answering Article XVIII of plaintiff's petition, defendant avers that this paragraph merely states a conclusion of law which defendant is not called upon to answer.

XIX

Further answering, defendant avers that New Orleans Railway & Light Company, the grantee and predecessor in title of defendant of the franchise to operate said street railway lines on Franklin Avenue was by Ordinance No. 6445, N. C. S., directed and required by the City Council, in 1910, in the interest of public safety, to construct said viaduct; that the said viaduct was constructed at a cost of approximately $58,000.00; that the said viaduct has ever

since been maintained and operated with due regard of safety by said New Orleans Railway & Light Company and by defendant as its successor, and it has proved entirely adequate and sufficient for the transportation of the users of said line; that said viaduct was required to be built over the tracks of the Southern Railway Company because at that point said grade crossing was dangerous, by reason of the fact that there are eight railroad tracks almost continuously used by said Southern Railway there are eight steam railroad tracks almost continuously used by said Southern Railway and other companies, for the switching and operation of trains and cars, during the day and the night, and that said viaduct was not required to [fol. 13] be extended across the railroad tracks of the Louisville & Nashville Railroad Company by reason of the fact that there was and is no such almost continuous switching and operation of trains and cars thereover as there was and is at said Southern Railway crossing.

Defendant further avers that the said viaduct has at all times been kept in a safe condition, has not been allowed to deteriorate has been operated with safety, has been entirely adequate for the needs of the public of that vicinity, which is substantially the same as it was when the viaduct was built; that there is no need whatever now to require the destruction of said viaduct and to require this defendant to cross eight tracks of the Southern Railway Company at grade crossing, which would not only be a needless expense involving a cost in excess of $135,000.00 besides the loss of the money already expended by this defendant's predecessor, as aforesaid; but would subject the defendant and the users of said street railway line to the very hazards and dangers of grade crossing accidents which the viaduct was intended to and does eliminate;

Defendant further avers that there is now and was no justification for the passage of said Ordinance No. 9375, C. C. S., requiring the demolition of said viaduct and that the defendant should re-build its tracks across said Southern Railway Company tracks at grade crossing and that the passage of said ordinance was unjust, arbitrary and oppressive; that it was not a legitimate exercise of the police power of the city and not required by any consideration of safety to the public. On the contrary, the demolition of

the viaduct and the requiring of defendant to cross said Southern Railway Company tracks at grade crossing would introduce the grace hazards and dangers which the viaduct has all these years eliminated.

Defendant further avers that said Ordinance No. 9375, C. C. S. was passed, not in the interest of public safety but in order to satisfy certain property owners who consider that their property is being damaged by the presence of said viaduct and for no other adequate reason; that defendant's predecessor was required by the City to build said viaduct originally at a heavy cost in order to obviate the dangers of a grade crossing and now to require defendant to demolish the viaduct which the city itself ordered should be built; and to establish the grade crossing aforesaid; is not a legitimate and proper exercise of the police power of the city, but an arbitrary exercise of its [fol. 14] power and utterly illegal and a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and of Section 2 of Srticle I of the Constitution of the State of Louisiana, an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article I of the Constitution of the United States, and of Section 15 of Article IV of the Constitution of the State of Louisiana, and a denial of the equal protection of the laws as provided by the Fourteenth Amendment of the Constitution of the United States.

Defendant further shows that said Ordinance No. 9375, if passed as alleged by petitioner, under the regulatory powers of the Commission Council as a Public Service Commission, under the Constitution of the State of Louisiana, was in violation of Paragraph 14 of Section 8 of the city Charter, Act No. 159 of the Acts of 1912, as amended by Act 95 of the Acts of 1921; that defendant was not granted any hearing and not afforded an adequate opportunity to present its case to said Commission Council, and was thereby deprived of its property without due process of law and denied the equal protection of laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Wherefore defendant prays that plaintiff's suit may be dismissed at its cost, and for all general and equitable relief etc.

(Sgd.) Dufour, Rosen & Kammer, Attorney- for Defendant. (Sgd.) Alfred C. Kammer, Trial Atty.

Duly sworn to by Herbert B. Flowers. Jurat omitted in printing.

[fol. 15] In Civil District Court of Orleans Parish, Division "C"

No. 172,248

City of New Orleans

vs.

N. O. Public Service, Inc.

Judgment—Jan. 22, 1929

The trial of this cause was resumed this day.

Present: B. I. Cahn and Wm. F. Coukerton, to represent the City of New Orleans; A. C. Kammer and E. C. Hollins, to represent New Orleans Public Service, Inc.

When, after hearing further evidence and argument of council, the court considering the law and evidence to be in favor of plaintiff and against the said defendant, for the reasons orally assigned:

It is ordered, adjudged and decreed, that the defendant New Orleans Public Service Inc., be ordered, commanded and directed to forthwith and immediately dismantle, demolish and remove the viaduct heretofore constructed and operated under the terms and conditions of Ordinance 6445, N. C. S., and ordered dismantled and removed by Ordinance 9375 N. C. S., that the said New Orleans Public Service Inc. be further directed, ordered and commanded to submit to the Commissioner of Public Utilities and the City Engineer for their approval, within thirty days from date of judgment herein, plans and specifications for the construc-

tion operation of a double line of tracks along Franklin Avenue and across Florida Walk, and in default of its so doing that the City Engineer be authorized and empowered and directed to prepare the proper plans and specifications for the construction of such tracks, subject to the approval of the Commissioner of Public Utilities and the New Orleans Public Service, Inc., be ordered, directed and commanded to immediately thereafter construct and to subsequently operate and maintain the said double line of tracks along Franklin Avenue and across Florida Walk, in lieu of the one now operated across the said viaduct; and ypur petitioner further prays that in the event the New Orleans Public Service Inc., should fail, neglect or refuse to construct a double line of tracks, as herein requested, according to the plan and specifications of their engineer, or in [fol. 16] accordance with such plans and specifications of the City Engineer of New Orleans, duly approved by the Commissioner of Public Utilities, then and in that event the city of New Orleans be authorized and empowered by judgment of this court to construct such double line tracks for the use of the said New Orleans Public Service Inc., and to recover from the said Public Service, Inc., the cost thereof.

Judgment read and rendered in open court January 22nd, 1929.

Judgment read and signed in open court January 31st, 1929.

(Sgd.) E. K. Skinner, Judge.

[fol. 17] In Civil District Court of Orleans Parish

[Title omitted]

Order Allowing Appeal—Filed February 4, 1929

On motion of New Orleans Public Service, Inc., defendand in the above entitled and numbered cause, through Dufour, Rosen & Kammer, its attorneys, and,

On suggesting to the Court that mover is aggrieved by the judgment herein rendered on the 22 day of January, 1929, in favor of the plaintiff; that the said judgment is

contrary to the law and to the evidence, and that mover desires to appeal suspensively and devolutively therefrom to the Supreme Court of the State of Louisiana:

It is ordered that a suspensive and devolutive appeal be granted to the said New Orleans Public Service, Inc., returnable to the Supreme Court of the State of Louisiana on the 29th day of Mch., 1929, upon mover furnishing bond with good and solvent security in the sum of One thousand dollars.

New Orleans, La., February 4th, 1929.

(Signed) E. K. Skinner, Judge.

[fol. 18] In Civil District Court of Orleans Parish

[Title omitted]

Statement of Evidence—Filed Mar. 25, 1929

Testimony and Note of Evidence Taken January 7, 1929, on Behalf of the Plaintiff, on the Merits, Before the Honorable E. K. Skinner, Judge, Presiding

Appearances of Counsel

For the City of New Orleans: B. I. Cahn, City Attorney; W. F. Conkerton, Assistant City Attorney.

For New Orleans Public Service: A. C. Kammer, Esq., E. C. Hollins, Esq.

[File endorsement omitted.]

[fol. 19] David W. Godat, a witness on behalf of the plaintiff, having been duly sworn by the Court, testified as follows:

Direct examination.

By Mr. Conkerton:

Q. Are you connected with the City of New Orleans?
A. Yes, sir.

Q. In what capacity.

A. Bridge engineer.

Q. Are you an expert engineer?

A. I term myself such.

Q What school, if any, did you attend?

A. Tulane University.

Q. When did you graduate?

A. I graduated in 1919.

Q. Since that time what work have you been engaged in?

A. I have been engaged in bridge work for that entire period of time with the exception of one year, from 1919 to 1920.

Q. What companies have you been connected with?

A. I have been connected with the United Iron Works, of Kansas, with the bridge department of the State of Illinois, both in a designing capacity and in field construction, and with the City of New Orleans.

Q. Have you ever made an examination of what is known as the Franklin Avenue viaduct?

A. I have.

Q. Have you any—at the time you made your examination did you make any memoranda of your findings?

A. I made a complete report of my findings which were submitted to the City Engineer, Mr. Vallas.

[fol. 20] Q. Have you those reports with you?

A. Yes, sir.

Q. Will you take up the first report, your first examination?

A. The examination in 1926? I think you have that, Mr. Conkerton. (Witness examines papers handed to him by counsel.)

Q. From your report will you tell us exactly what condition you found existing?

A. At the present time?

Q. At that time.

A. In 1926, I found the viaduct to be in an unsafe condition. The degree of unsafety was such that I requested, through Mr. Vallas, that the Commissioner of Public Utilities stop the cars.

Q. In what respect did you find the viaduct in a dangerous condition?

A. I found the viaduct to be in an unsafe condition primarily on account of the condition of the bents which support the stringers and the track structure itself.

Q. Explain to the Court exactly what you mean by a bent?

A. A bent is a supporting structure, usually composed either of piling or of upright timbers, usually sufficient in number *fo* carry your load, and in case the structure is elevated so constructed as to take care of the thrust and sway of the cars.

Q. What was the condition, the general condition of all these bents?

A. The condition of the bents varied considerably. Some bents were in very satisfactory condition. Some bents were such that the caps which supported the spans themselves [fol. 21] had rotted considerably, others were such that the piling which supported the caps, and in turn the track structure, had become rotten to such a degree as to leave nothing but a shell of the former pile.

Q. Did you make any later examination?

A. I made an examination on December 31st, 1928, and January 2nd, 1929.

Q. On December 31, 1928, what condition did you find?

A. I found the condition somewhat improved over that of the former inspection, in that the Public Service had removed certain of the bents formerly considered dangerous in the original report, but I found still other bents which were in a dangerous condition.

Q. Did you examine in what manner those bents were removed?

A. Yes, sir, we examined—I did not examine the manner in which they were removed, but we examined the replaced structure and it was satisfactory, that is, there are some of the cases—I would like to amend that—there are one or two cases in which I would not consider the work done as satisfactory, that is, the piling which had been cut off, the rotted piles cut off, and new piling substituted or a new stub of piling substituted, did not make contact with the top surface of the pile which had been cut.

Q. These piling that were inserted to take the place of those removed, in what manner were they put in, were they driven into the ground or how?

A. No, sir, the original piling were cut off in the majority of cases approximately at the surface of the ground and [fol. 22] a new pile had been cut of the length from that point up to the bottom of the cap, it had been swung into place, and the criticism offered was that the contact was not made such as to carry the load itself from the cap down into the portion of the pile in the ground.

Q. What effect would that have when a car passed over the viaduct?

A. If the bent, if the pile was an interior pile it would have very little effect; if the pile was an outside pile or one of the—if it was an outside pile, it would probably be as useless as not having any pile in there whatsoever, that is, as long as it makes no contact it serves no purpose.

Q. Were they outside or inside piles?

A. The pile was inside, or the piles—they were two in number—they were both inside piles. There were other piles replaced between the inspection of 1926, at bent 28 of the Gentilly side, which was spliced in a different manner, with a staggered splice, or with a splice constructed approximately 14 or 15 feet above the ground, and the face of the pile bolted in. The whole bent, with the exception of two piles which support the truck platform, had been replaced in that particular bent in a very satisfactory manner.

Q. Can you tell how many of these bents were in that condition?

A. In January?

Q. Yes.

A. I found bent No. 1 on the city side or river side, is in a dangerous condition; bent No. 2, bent No. 3, bent No. 8, bent No. 13, bent No. 15, bent No. 16, bent No. 21, bent [fol. 23] No. 22, and bent No. 25, all on the river side of the structure, were considered as unsafe. On the Gentilly side, there was bent No. 1, bent No. 8, bay 8 and 9, bent No. 22 and bent No. 23 were considered unsafe, together with the support of a single portion of one member of the stringer which was considered dangerous on account of insufficient bearing.

Q. In your earlier report of some time in 1926, refer to that report and tell us how many bents were unsafe?

A. On the Gentilly side I found bent No. 8 was considered dangerous, bay 8 and 9, both of which are referred to in the report of January 2nd; bent No. 13 was considered dangerous; bent No. 15, bent No. 18, bent No. 22, and bent No. 28, all on the Gentilly side. Now, on the uptown side, bent No. 13 was considered dangerous, bent No. 22 and No. 23, that is a double bent, and bent No. 25 was considered dangerous, and an addition which I made just now was bent No. 2 on the Gentilly side, considered dangerous at that time.

Q. I show you a photograph marked P-1 and ask you to point out to the Court exactly what you mean in your testimony by a bent, if you can from that photograph?

A. (Exhibiting the photograph to the Court) What I mean by a bent is the piling which composed the supporting structure. All of these bents, this, this and a pile which is not shown in the photograph would constitute a bent. In the second bent in the picture this, this and this would constitute the lower portion of the bent; the upper portion would be the cap, directly over the top, [fol. 24] which was 12x12 in section.

Q. Now the ordinance providing for the construction of the viaduct provides that it shall be constructed on the center of the neutral ground. As an engineer, and from your examination do you find that the viaduct is constructed on the center?

Objection by Mr. Kammer: That question is objected to on the ground that the construction of the viaduct insofar as its relation to the neutral ground to-day has nothing to do with the construction of the viaduct in relation and in respect to the neutral ground on the date of the construction of the viaduct and the passage of Ordinance No. 6445; also the ordinance says "approximately in the center."

The Court: I think I will let the objection go to the effect.

Mr. Conkerton: Strike out the question.

Q. As an engineer, from your examination would you say that the viaduct is constructed practically in the center of the neutral ground?

Objection by Mr. Kammer: I insist again that the ordinance does not say in the center, it says "approximately in the center."

The Court: Use the language of the ordinance, Mr. Conkerton.

Mr. Conkerton: Change the word "practically" in the question to read "approximately".

A. I have made no tape measurements to ascertain whether or not it is. I understand that the engineer's plans providing for the paving of the street, a survey by another party, shows that the axis of the viaduct is not approximately on the center of the neutral ground by approximately six and a half feet.

[fol. 25] Q. And the earthen embankment, does that exceed the neutral ground width of Franklin Avenue?

A. Yes, sir.

Q. How much does the earthen embankment exceed the neutral ground space on Franklin Avenue?

A. At the river end of the viaduct the neutral ground is such as to maintain the correct width of road way between curves, 28 feet. At the terminus of the earth filled approach, the earth fill has spread over the neutral ground area for a distance of ten feet, diminishing the road way down to 18 feet, from 28 feet to 18 feet.

Q. Are the approaches to the viaduct entirely of earthen embankment?

A. I don't think so, from the nature of the embankment it appears as if piles had been driven practically the entire length or at least a portion of the length of the embankment and later filled with rock. That would be a surmise, because it is more or less impossible to determine what is underneath the rock.

Q. Is there an earthen embankment from the commencement of the grade to the top of the bridge or to the bridge proper?

A. Yes, sir.

Q. I show you a photograph marked P-2 and ask you from your examination and inspection if that shows the condition as it exists?

A. This shows the condition on the lower side of the viaduct, on the river end.

Q. Does it show anything else besides earthen embankment?

A. In what way, Mr. Conkerton?

[fol. 26] Q. I mean does it show that earthen embankment was used all the way or does it show that piling was used, or what?

A. It shows that earthen embankment is—has been used to, I should say, for a distance of approximately 200 feet as an approach to the trestle structure.

Q. In other words, part of the approach is trestle work and part is earthen embankment?

A. Yes, sir.

Q. As an engineer could you tell us why these concrete collars were placed on the bottom of those piles? (Exhibiting photograph)

A. There is no reason at all why there should be any collars around the base of a creosoted pile. Evidently at the time this structure was built the engineers felt that there may be deterioration of the pile or rotting of the pile at the surface of the ground, and the concrete collars were placed around the pile as a means of protection, but any pile which has a sufficient amount of creosote oil need not be protected in that manner.

Q. Did you make an examination to determine whether or not these piles were sufficiently creosoted?

A. The indications are from probing that there was a fair degree of creosote originally placed in the piles. We made no boring tests, but did quite a bit of probing. There is also a further indication of that in that the ground has shrunk from its original level until it is now considerably below the collar, and the rotting of the pile has not taken place with the exception of five instances on the entire viaduct. That in itself would be pretty conclusive evidence [fol. 27] that the creosoting was well done.

Q. Did you make any examination of the bridge proper?

A. The steel work, yes, sir.

Q. In what condition did you find it?

A. In very good condition when the examination was made. I refer now to the examination of 1926. We gave a—well, I gave a more or less visual inspection this January, but there was nothing to indicate that the steel structure was unsafe with the exception of its foundation.

Q. What about the foundation?

A. The foundation on the riverside, in connection with the foundation on the riverside the earth has subsided away from the base of the pier, exposing at least two and possibly three rows of the piling which support it. The front row of piling had twelve piles and of those twelve piles eight of them—five of them—were rotted to such a condition you could almost shake them apart with an ordinary wooden stick. There was, however, some small part left in the pile, but not sufficient to carry any real load at all. Now, we were unable to get into the second and third row of piling, but I would feel that the same conditions were present in those piles as you would find in the first row, on account of the fact that the same conditions were present. In other words, the pile was exposed to the elements and to the puddling action of any rain water which might seep under and not drain away.

Q. Did you examine the wooded part of the bridge proper?

A. The wooded part?

Q. The part constructed of wood?

[fol. 28] A. The trestle work, in detail.

Q. What did the examination disclose?

A. The examination disclosed in the main that your track system was in a fair state of repair with the exception of certain ties which had begun to rot. The stringers were as a whole good. The caps of the piling, with three exceptions, I think, were good. The piles, however, which supported the caps, in the bents which I called out, *had* rotted to such an extent as to be considered dangerous.

Q. That was from the examination of what date?

A. December 31, 1928, and January 2, 1929.

Q. Did your examination give any evidence of any new or recent work having been done on the bridge proper?

A. Yes, at the time we were inspecting the Public Service had a foreman and a crew of men at work replacing certain features of the dangerous portion of the viaduct, in the trestle proper, that is.

Q. In connection with whom did you make the examination?

A. The examination was made in detail by Mr. Wyler, Assistant City Engineer, and Mr. Booksh, both Assistant Engineers of our office.

Cross-examination.

By Mr. Kammer:

Q. Mr. Godat, taking up first your inspection and report made in 1926, I will ask you whether or not at that time you considered the viaduct in an unsafe or dangerous condition?

A. I did. I reported so to both Mr. Vallas, and when he left town directly to Commissioner Hall.

Q. What do you mean, in general terms, by an unsafe or dangerous condition?

[fol. 29] A. In preparing the report I considered those bents, that is, eliminating the caps and super-structure, first those bents which were composed of three piles, if either outside pile or both outside piles had heart rot directly beneath the cap, that is the portion of the pile in bearing against the timber, greater than six inches, that pile was considered as dangerous.

Q. Dangerous in what way?

A. In that the pile was not considered capable of safely carrying your load.

Q. What is the load that that structure carries ordinarily?

A. The computations which were run out took into consideration a 32 ton car. Those—we had no diagrams of the car which operates over that track, and took the diagrams which had been furnished to us by the Public Service in connection with the Carrollton bridge. I think those cars are practically same in weight as the others. I would like to say this, though, in considering the danger—I may be anticipating your question—the area of the pile left in any pile which has six inches of heart rot it is sufficient, with the allowable stresses which are considered safe, to carry your load, and the condemnation was not based on the allowable load which might be carried by sound wood. It was based on this fact, if the pile was rotted at the top, had heart rot of six inches or greater, the danger would not be so great from the crushing either of the fibres of the cap or the fibres of the pile proper but from the possibility of that shell of pile splitting into a certain number of segments, each segment of which would be called upon to carry your load in column action, which would be great-

[fol. 30] er than I felt would be safe to place upon that particular pile. My point would be brought out better by an illustration: the old type of building construction allowed the use of cast iron columns or cylinders of pipe. The cylinder of pipe or cast iron column is capable of sustaining a certain load. If you take that pipe and cut it into ribbons around the sides and destroy the continuity of the shell, it would not be able to carry the same load even though you had the same area of solid material present.

Q. As I understand your testimony your inspection and finding that the structure was unsafe was not in relation or taken with regard to the load that the trestle carried or was built to carry?

A. Yes, it was—it is.

Q. I understood you to say just now that you did not refer to the fact that the cars that you estimated were going over the trestle weigh 32 tons?

A. I may have given you an erroneous impression. The point I would make is that the stress which would be produced by that car was not the consideration in condemning the pile under consideration, but the possibility of breakage of the shell of any pile left after rotting had eaten the heart out, due to that street car load applied directly over it.

Q. How many piles are there to each bent?

A. There are for the first—up to bent No. 8 there are three to each bent; from bent No. 8 to the steel structure there are four piles, with the exception of bents Nos. 22, 23, 24, and 25 on the city side or river side, which bent is [fol. 31] a double bent and carries the steel span across the Florida Avenue canal.

Q. When you speak of a double bent you mean eight piles?

A. Eight piles fastened together not only by caps but by a separator bolted to each pile and through the separator itself.

Q. At what you might term the weakest part of the structure there are three piles to a bent?

A. Yes, sir.

Q. And the more piles you put in a bent the stronger the trestle is?

A. I would say this, the more piles you put into a bent the greater rigidity that bent possesses. The additional piles which were put into the bent start at bent No. 8, at which bent the difference between the elevation of the track and the ground begins to get so great as to necessitate more piles in order to stabilize the structure under the operation of the car.

Q. Then as I understand it that portion of the trestle where there are three bents is carried equally as safe as the balance of the trestle where you have four or more bents?

A. It carries the same load.

Q. It carries the same load with the same degree of safety, because, as you say, the higher up you go with the trestle the more bents you put under it?

A. The more piles you put to give lateral bracing.

Q. Did you in 1926 after your inspection consider that while you found these defects that the trestle was safe for the operation of cars there over?

[fol. 32] A. There were two inspections made in 1926, one on October 31, and one on November 8. The first inspection was made by myself, Mr. Wyler and Mr. Cracroft. The purpose of the inspection, the limited time in which to make the inspection did not allow us a sufficient time to, oh, go into it as much in detail as we wanted, and for that reason the findings were referred to Mr. Vallas with the request that the street cars be stopped until such time as a joint investigation could be made in connection with the engineers of the Public Service, which request was granted, and a joint inspection made by myself, Mr. Guillot and a party of men under the Public Service. The findings of the November 8th inspection, or the purpose of that inspection, was to ascertain how much danger existed in the piles which were called dangerous on the first inspection. Now, after the inspection I still—I wrote a second report in which the viaduct was considered as dangerous. In Mr. Vallas' absence the report was sent directly to Commissioner Hall.

Q. Now, does that report that the viaduct was dangerous, or did those findings consider that the whole viaduct was dangerous, I mean, now, for the purpose that you had in mind in stopping the cars?

A. No, sir, the findings were such that would allow the street cars to operate. Wait a minute. I would like to think a minute—Yes, the inspection was such as to consider the viaduct safe temporarily for the operation of the cars, and, as I remember it, I requested that men be posted at Bent 28 on the Gentilly end of the viaduct to observe those —that bent under the operation of the cars, because it was that bent more than any other which caused the condemnation of the viaduct itself.

[fol. 33] And didn't you state at that time that with the correction of the defect at bent 28, the structure would be safe for the operation of the cars?

A. It would be safe for the operation of the cars? Yes, it would with this proviso, that all those defects reported would be immediately taken care of—that was the stipulation in my letter to Mr. Vallas and Commissioner Hall, immediately taken care of by the Public Service. They haven't been done, though.

Q. What I have in mind, Mr. Godat, is this, that with the repair of bent 28 didn't you consider that the viaduct was sufficiently safe for the operation of cars there over?

A. Until such a time as the remainder of the repairs were made?

Q. I am speaking of at that time, if you corrected the defects in bent 28, didn't you consider at that time that the viaduct was sufficiently safe for the operation of cars?

A. I did consider it sufficiently safe, provided the Public Service immediately repaired not only bent 28 but all those bents considered unsafe in that report.

Q. Now, in your report to the City Engineer, dated November 8, 1926, you said, I will read to you from the report: "After a thorough consideration of my findings, as a result of this examination, I would respectfully recommend that you report the viaduct unsafe. This recommendation is based upon the serious condition of bent 28 on the Gentilly end of the structure, after the repair of which bent the viaduct might be considered as sufficiently safe for the operation of the cars."

A. There is no further proviso in that letter?

Q. I will read the balance of that paragraph: "I would, however, urgently advise that the New Orleans Public Service, Inc., be directed to start preparations immediately

[fol. 34] for the repair of the other items noted in the attached report."

A. Yes, sir, and I would like to explain to you the reason why that was placed, I mean why bent 28 was considered to the exclusion of every thing else, and why it was considered safe for the operation of the cars over the other bents, although they contained defects of a very serious nature. The viaduct is constructed with 80-pound rail, which is practically continuous along the entire length of the viaduct. The guard rails on the viaduct, I had no means of ascertaining their actual weight, but they would approach 60-pound rail. Now, in addition to that, the stringers which form the supporting structure and transmit the track load directly into the bents, are continuous over three bents—they are continuous over three bents for one portion of each stringer. That may not get across, but I would like to amend it like this: each stringer is composed of two 7 by 12 timbers, which timbers are fastened together by means of separators with bolts. Now, those timbers extend for three bays, or three bents or two bays, the splices being staggered alternately, which means that over any particular defect you have a solid timber in addition to the rigidity of the track structure above you, which means this—as a street car goes across any defective portion of the viaduct the continuity of the track structure, plus the continuity of a portion of each stringer, was capable of diminishing a portion of the load which went into that defect, and capable of carrying that wheel load or truck load to the adjacent bay,—but that is something never to take into consideration in good design. In good design the track structure is not considered as a portion of [fol. 35] your support.

Q. But you considered that, with that character of stringer and that character of rail, that even though there might be a defect in one pile or one bent, the fact the stringers carried over three different bents, and the stringers were interlocked at staggered positions, that even though one pile was defective the viaduct was sufficiently safe to carry the ordinary load of the street car and passengers?

A. That is correct, but that is not good engineering practice. In other words, your danger would be minimized, but

you were diminishing the factor of safety, which every engineer must take into consideration in the design or report of a structure.

Q. I mean, speaking of your own opinion as an engineer, not a question of good design, in your opinion that structure was safe?

A. It was safe for the operation of the cars, provided you were willing to diminish the factor of safety, and that factor of safety in that report was considered as being, it was considered as satisfactory to diminish that factor of safety for such a period of time as the Public Service required to repair those defects, but it was not considered for a year or two years or an indefinite period of time.

Q. Suppose no further deterioration had taken place in that particular pile you found defective, and none of the other piles became defective or deteriorated, would not that safe condition last 10 or 15 years, or for the life of the pile, or until some further defect did appear?

A. Yes, that is true.

Q. I understand you to say you found the defect in bent 28 in 1926 had been corrected?

[fol. 36] A. Yes, that is correct. Let me say this: the defects of the portion of the structure supporting the track were corrected, but the two piles on the outside which support the track platform, on which the passengers wait, are still uncorrected. That bent is composed of 6 piling, all 6 of which were condemned. The Public Service has repaired the 4 directly beneath the track, and left the 2 which support the platform on which passengers wait uncorrected.

Q. Is the platform protected by—I don't know what you call them, if you were building a house, you would call them sills,—but by timbers that project out on the side of the track supported by piling under the center of the track?

A. That is correct.

Q. Wouldn't that platform be safe for the landing of passengers even without any pilings under the platform?

A. I think it would. It would take a very large crowd to really make that platform dangerous, even though the two outside piles were bad.

Q. Or were eliminated entirely?

A. That is correct.

Q. I understand your examination made in December, 1928, and January, 1929, showed the conditions as much improved over the inspection you made in 1926?

A. In that the principal defect found at that time was corrected, yes.

Q. Now, the defects you found in your last inspection, the more recent one, those defects are such defects likewise as you found in 1926, with the exception of bent 28, is that correct?

A. That is correct. One bent, however, has developed a much more serious condition than probably any encountered in 1926. The first bent on the river side of the structure [fol. 37] is composed of three piling. Those piles have been named a, b and c, from the uptown side going down. Now, pile c, the last pile on the lower side, is nothing now but a shell. What I mean by shell is it has probably less than 1½ inches of sap ring left. Not only has the pile deteriorated to such an extent as there is nothing but a ring, but that ring has been split either by an ax or by natural causes. It appears to have been busted by an ax. The crack is an inch and a half wide at the top and tapers down. Soundings on the pile below the point where visual inspection was possible shows the pile hollow for a distance of 6 feet. That is one pile out of three. The second pile, b, makes contact against the undersurface of the cap on only the half of its area, which half is sufficient under the stresses produced to safely carry your load. However, it is not considered good construction. Pile a of the same bent does not make contact at all with the lower surface of the cap by more than three-quarters of an inch. In order to hold that pile and cap in its present position, two steel straps had been placed by the Public Service, approximately three-quarters by 3½ inches. They are bolted to the pile by two bolts and bolted to the cap by two bolts. Under the operation of the street car, that cap, which in this case is two 12 by 12's placed on one another, instead of a single 12 by 12 in the other bents, deflects approximately a half inch. In deflecting, however, it does not make contact with the top of the pile, which means your entire load is carried by the center pile of that bent, because the outside pile can not be considered as carrying any load

whatsoever. It may take a small load, but at any time that [fol. 38] shell is liable to collapse, in my opinion.

Q. How far is the next nearest bent on either side of that particular bent?

A. Sixteen feet in one direction and about 5 feet in another direction.

Q. Are the stringers that run over those three particular bents in one piece of pieces spliced?

A. The stringer is made of two timbers, and one timber of each stringer is continuous over that cap.

Q. In other words, as I understand it, the stringer reaches from the bent 15 feet away to the one 5 feet away?

A. That is correct, or one-half of each stringer, because the splices are staggered and one splice must occur directly over the cap of the defective bent. The stringer is composed of two pieces of 7 by 12 timbers.

Q. Is it necessary to have two 7 by 12 timbers or wouldn't one do the service just as well?

A. No, sir, two stringers are necessary—two pieces are necessary.

Q. Now, don't you consider the stringers at that point are sufficiently strong to carry the load from the bents on either side, even though that particular bent you are speaking of was eliminated entirely?

A. They are doing it now, with the help of the rigid track structure above it, but in so doing cause considerable sway of the car as it passes over the defective bent. If you take that bent out, however, I would not say the track structure and stringer would be capable of carrying your load across. You would more than likely have failure.

Q. You are speaking of those stringers being 7 by 12. Isn't it a fact they are 7 by 14?

[fol. 39] A. No, sir, 7 by 12.

Q. Now, Mr. Godat, what are the sizes of those piles under that structure?

A. The piles have an average diameter of 14 or 15 inches. Some of them are less than that. Some are less than 12 inches in diameter at the top, but there are very few.

Q. Very few less than that?

A. Yes, they average 14 to 15 inches.

Q. They are rather large timbers for a structure of that character?

A. No, sir, I would say they are the average timber currently used for that type of construction.

Q. Now, taking a timber of that size that has been creosoted, what amount of deterioration in such a timber would produce a dangerous condition?

A. What amount of deterioration?

Q. Yes?

A. The size of the pile would have very little effect in the condition at the top or adjacent to the under-surface of the cap, because even though the pile is 14 or 15 inches in diameter, the portion which is effective must have the same width as the width of the cap, which is 12 inches. Therefore, in making this report, six inches was considered as the maximum amount of deterioration which would be allowed in considering a pile a dangerous pile.

Q. Do you mean six inches on the outside or six inches of heart?

A. That would mean six inches of the portion of the pile underneath the cap, regardless of whether it was heart or sap, the favor, however, being in case the sap rots out you have a better condition than if the heart rots.

Q. As I understand it, the heart is stronger than the outer shell?

[fol. 40] A. It is.

Q. Now, speaking of deterioration, just what sort of deterioration is there in those piles?

A. The deterioration is rot, which has removed the portion of the pile directly beneath the cap to such an extent that there is a void which you can get down into with either a probe or with a stick or anything at all. In other words, there is nothing left in the middle if that was six inches of heart rot, it means nothing left there—it has disintegrated.

Q. You still have six inches of shell, and I ask you again, if I understand you correctly in saying that the six inches of shell are not as strong as six inches of heart with no shell, is that correct?

A. Yes, sir.

Q. What becomes of this theory of yours that you were telling us about a while ago, about the cast iron pipe construction for supports, where there was nothing but a shell with no center to it?

A. Your theory holds true. The difference is this: in the case of the cast iron column, the material forming the outside surface is a material which is not subject to destruction; the outside surface of a pile after the heart is gone is composed of sap wood, which is subject to and does check and break, which means that instead of carrying your load directly on a ring of solid wood, even though that wood may be softer than the heart, you are forced to carry it, in case of checking, on the individual segments which formerly composed that ring.

Q. That is in case of checking only?

A. You must always consider checking. It is a very [fol. 41] possible and probable effect, and if not present at the present time it is liable to occur at any time.

Q. What do I understand by checking?

A. It would mean breaking or separating of the fibres.

Q. A sort of splitting at the top?

A. Splitting.

Q. Could you tell from your examination how long some of that deterioration or heart rot had been there?

A. No, sir, there is no means of telling.

Q. Did you find any of the piling that had been checked or split?

A. Yes. I mentioned a moment ago pile No. 1 of the first bent, and that is one occasion, and you will find in many of the other bents slight separation—you will see little wiggles across the top of the pile indicating lack of continuity of the shell, which means the beginning of the disintegration of the sap wood.

Q. Do you know the strength of either the shell of pile or the heart of pile of that sort, where half is gone? If the heart is gone, you have the other half of the pile in the shape of a shell; if the shell is gone you have the other half of the pile in the shape of the heart. Do you know the strength of either one of those two?

A. Under ordinary conditions, you would consider this: there are two cases: one is the case of unit stresses applicable to safe design, which include the factor of safety. The other is the strength of that shell at the elastic limit, or the point where the timber is ready to crush. Now, the strength—1100 pounds or 1050 pounds is ordinarily considered the strength of dense wood, regardless of heart

content. Now, if you had a shell which, upon which—I mean, [fol. 42] if you could consider that shell as having a certain amount of continuity without the possibility of breakage, you would multiply the area of the shell left by the unit of stress, and that would give the supporting capacity of that pile. But I have not, in my report, considered that, because I have been governed by the fact that I am afraid of the splitting of your pile and the breaking of that segment. I will say this, if you consider it, the strength of any one of those shells, with the exception of those less than 1½ inches in thickness, is sufficient to carry your street car load across.

Q. You spoke of making your inspection of these piles by probing. Just what do you mean by probing? Taking some instrument like a screw driver or something of that sort and sticking it in the pile?

A. The method of examination was this: most of the piles were 15 inches in diameter, 14 to 15 inches, which means a portion of that pile projects beyond the face of the cap—naturally rotting will occur on the exposed surface. When rotting occurs on the exposed surface, it gives you a chance to insert your probe. Our probe was a screw driver in one end and an ice pick in another case. The length of the ice pick was known, and we measured the distance the ice pick was able to penetrate easily beyond the face of the cap, and that gave us the amount of heart rot which was under the bearing area.

Q. What are the relative merits of boring inspection as compared to the probing such as you mentioned?

A. Boring inspection is usually considered superior, but I believe that boring inspection, unless a number of borings are taken around the entire periphery of the pile, you have no means of knowing what the content is inside. [fol. 43] If you have a pile, round pile, with rot in the center, and you run a probe through, you would run through a certain rotted area and be able to measure it, but you would have to run through in two or three directions before you could ascertain the correct amount.

Q. Wouldn't you have to do that with a probe also?

A. In the case of a probe, if the pile was exposed, which is the condition in most of the cases here, we were able

to see both with the eye and feel with the probe the extent of the rot.

Q. Now, Mr. Godat, you spoke of the width of the neutral ground out there. You don't profess to know anything about the width of the neutral ground at the time that viaduct was erected, or at the time the fill was placed in that portion of the trestle which you say is now filled with rock and earth, making up the earthen embankment?

A. No, sir.

Q. All you know is that to-day the neutral ground is of a certain width at the place where the viaduct crosses the tracks and the Florida Walk Canal, is that correct?

A. That is correct.

Q. Do you know whether or not the neutral ground of Franklin Avenue at that part thereof where you say the roadway is 28 feet has been narrowed from what it was in 1914, say?

A. I could not answer that.

Q. You don't know anything about that? All you know is what the width of the present paved roadway is to-day?

A. I only know what the city engineer's plan shows. My instructions were not to consider, or rather not to investigate the conditions of the paving in there. That part of the work was surveyed by a distinctly different party of men, the street work was put in by a different department [fol. 44] of the city engineer's office, and I would rather not answer anything except from the plan.

Q. What you had reference to when you said the earthern embankment encroached on the roadway was merely that at that particular point the roadway was narrower than on the city side of the viaduct, is that correct?

A. It is.

Q. That is as far as you intended your testimony to go?

A. That is correct. That is my visual observation, what I can see every day when I drive out there.

Redirect examination.

By Mr. Conkerton:

Q. In the example you used of a cast iron column, you had reference to a whole column, didn't you?

A. Yes, sir.

Q. The method you used, the probing method, is it or is it not the approved method of examination by engineers?

A. The probing method is a very satisfactory method provided you can see as well as probe. If you can not see, the results from the probing are inaccurate. In every case in the report which I have here, we have not only visual inspection, or rather not only probing inspection but visual inspection. In the cases in which a pile is termed as sounding hollow, a memorandum has been made opposite it as no means of visual inspection.

Q. Mr. Kammer asked you a hypothetical question based upon the fact that you thought the cars could safely run over the viaduct provided no other defects had come into existence after your report of 1926. After, your examination made after 1926, did it disclose any other defects had [fol. 45] developed?

A. There are some defects that we had neglected to see on account of lack of visual observation. For instance, bent No. 1 on the city side, I don't think that was condemned in the original report,—the splitting of the pile allowed us to see into the interior and explore further. That condition may exist on more than one bent.

Q. Were all the defects contained in your report of 1926 corrected?

A. No, sir.

Q. When you say in your testimony in direct examination, referring to the report which Mr. Kammer read to you, that if bent 28 was repaired cars could safely run over, did you mean that it was not necessary at all to make the other repairs in the proviso of your report?

A. No, sir. That was the reason for asking Mr. Kammer to read the remainder of the letter, which he did, and the remainder of the letter urgently recommended that the Public Service be directed to make the remainder of the repairs.

Q. And if bent 28 was immediately repaired, it would be safe to run cars over the viaduct until the Public Service had opportunity to make the other repairs?

A. That is correct. In so doing, we were taking into consideration the continuity of the track structure. In other words, we were diminishing the factor of safety to allow the Public Service to still operate over the tracks.

Q. In other words, it was just a temporary matter and there was no immediate danger at that time if those repairs were made as soon as possible?

[fol. 46] A. Yes, sir.

Recross-examination.

By Mr. Kammer:

Q. I understood you to say that some of your recommendations of 1926 had not been corrected upon your inspection of 1928-1929?

A. Many of them.

Q. That inspection was made more than two years after your previous inspection?

A. Yes, sir.

Q. And those so-called defects you found in 1926 existed all that time?

A. Yes, sir.

Q. If I were to tell you there was no accident of any kind happening during those two years, would you still contend those defects were vitally necessary to be corrected to make a safe trestle?

A. Yes, sir. There are many, many bridges, Mr. Kammer, which stay up in spite of the fact that they are unsafe. The fact that an accident does not occur is not indicative of the fact the thing is not dangerous.

Q. What do you consider proper maintenance?

A. Proper maintenance is to insure, is to keep all material and workmanship which go into the construction of the viaduct in a first class condition. Maintenance should mean the up-keep of the viaduct practically in the same condition existing at the time it was accepted by the engineers of the Public Service when the viaduct was completed.

Q. Can that be done?

A. Yes, sir.

Q. In what way?

A. It can be done by using pile caps, approved pile caps, [fols. 47-51] to prevent rotting at the tops of the piles. The piles should also be adzed off, the corners of the piles which project. Rotting begins not beneath the cap carrying the load, but on the portion of the pile which projects beyond the cap, which retains water and begins to seep beneath.

The viaduct was not properly constructed when they did not adze off the edges of the piles which did project.

Q. And you say you could keep it in the same condition it was when it was originally built?

A. Practically so.

Q. And no deterioration would take place?

A. Why, that is an absurd question. You must take into consideration a certain amount of deterioration, but that deterioration must not run. There is an economic limit to it. You take a pile, as I said before a pile was not considered dangerous until after six inches of rot had taken place, and when that six inches of rot took place, the Public Service should have cut that pile off and made a proper splice. That is what I mean by proper maintenance.

Q. Do you consider a spliced pile as strong as un-spliced pile?

A. It can be made stronger.

Q. And your idea of proper maintenance is to keep the structure in the same condition as when it was originally built?

A. Yes, sir, I think so.

[fol. 52] ALBERT G. WYLER, a witness on behalf of the plaintiff, having been duly sworn by the Court, testified as follows:

Direct examination.

By Mr. Conkerton:

Q. How old are you, Mr. Wyler?

A. Twenty-four.

Q. What is your connection with the city?

A. Assistant Engineer, street construction department at present.

Q. How long have you been connected with the City Engineer's office?

A. Three years, the 16th of this month.

Q. Are you a graduate engineer of any school?

A. Of Tulane University, civil engineering, in 1925.

Q. As assistant engineer did you in company with Mr. Godat who was on the stand this morning, make an examination of the Franklin Avenue viaduct?

A. I made an examination of the Franklin Avenue viaduct, city side, the approach portion towards the city, in 1926, as well as the latter part of 1928 and beginning of 1929.

Q. Did you hear Mr. Godat's testimony on the stand this morning?

A. I did.

Q. Can you verify the facts as testified to by Mr. Godat this morning?

A. The facts in regard to the condition of the viaduct, the physical facts and those brought out by our examination, yes, sir.

Q. Would your testimony be substantially the same as his?

Objection: By Mr. Kammer: It has to be the same, or he has to ask specific questions.

Q. Would your testimony be the same as Mr. Godat's? [fol. 53] A. Not in detail. There are certain specific points where I do not agree with Mr. Godat on, not exactly the same, for the simple reason that certain things he testified on I never inspected. He testified on the entire viaduct, and I inspected only half the viaduct.

Q. As to that half you inspected, I understand that is the half towards the city—(interrupted)

Objection by Mr. Kammer: I don't think this is proper examination of the witness.

The Court: I think, myself, you had better put it in extenso. Asking one witness to affirm what another says does not mean much.

Q. From your examination, Mr. Wyler, will you tell us the exact condition of the viaduct as you found it in 1926, that portion which you examined?

A. The condition was such that a number of piles in different bents were rotten in the heart and had nothing but a shell around them, and working under Mr. Godat the dangerous bents were marked according to six inches of heart rot or more, and in particular I recall bent 13, which, where on the cap, although we could pry in through the top, checking the top of the cap for practically the entire depth, and under a moving street car the cap would act

as though that of a sponge—it would crush and the sides would bulge out, which in my opinion, is a point of danger. I never run any stress computations on the viaduct, as it was purely physical facts I was turning over to Mr. Godat.

Cross-examination.

By Mr. Kammer:

Q. What experience have you had with regard to trestle construction?

[fol. 54] A. None other than working with the bridge department of the Dock Board during my sophomore and junior year at Tulane, and a little bridge work with the City of New Orleans. Outside of that, none.

Q. What trestle work does the city do?

A. It was not any trestle work exactly, it was foundation for a bridge, which is very similar to trestle work.

Q. What kind of a bridge?

A. Timber I-beam bridge over the outfall canal in Algiers.

Q. How wide was that bridge?

A. Twenty-two foot roadway. The length was about—wasn't anything compared to the viaduct. However, it was about 35 or 36 feet in length.

Q. You merely worked on the construction of the bridge?

A. I was the engineer in charge of the construction.

Q. You had nothing to do with the plans and specifications?

A. I had nothing to do with the plans and specifications.

Q. That one bridge you speak of is the extent of your experience?

A. In the bridge line, yes, sir.

A. M. Schneider, being first duly sworn by the Court, testified as follows:

Direct examination.

Mr. Conkerton:

Q. Do you know of your own personal knowledge the original construction of the Franklin Avenue viaduct?

A. Not of my own personal knowledge.

[fol. 55] Q. Where do you reside?

A. 4030 Franklin Avenue.

Q. How long have you resided in that section?

A. I have lived in Edgewood 14-1/2 years.

Q. Do you frequently use the viaduct?

A. I did for a number of years, in the last year or two years I have not used it much. I have a car. But previous to that time I used it considerably.

Q. Have you recently used the viaduct?

A. Not in the last six months.

Q. During the time that you used the viaduct what was its condition, to your own personal knowledge?

Mr. Kammer: I object. I don't know what line the testimony will take. If it is in regard to engineering or construction or anything of that sort, I submit that the witness is not properly qualified, and I object to any testimony along that line.

The Court: The objection goes to the effect.

A. It was generally unsafe to my knowledge.

Mr. Conkerton:

Q. In what respect?

A. Well, certain repairs were necessary. I was in an accident at one time there, and during that time that I used it there were several times there that, one particular instance, where there was a sort of dip in the viaduct where cars would sway as they went up, denoting that the piling had sunken to some extent.

Q. The accident that you speak of, what was that occasioned by?

A. Conflict of signals is what they claimed. Two cars [fol. 56] met almost on the top.

Q. Did they collide?

A. Yes, sir.

Q. Were you injured?

A. I was slightly injured in being knocked out of the seat my jaw hit the seat in front, and the teeth penetrated the skin of my jaw.

Q. Was anyone else in the car injured?

A. Yes, sir, there was considerable people injured. In fact, in both cars there were injuries. I don't recall how many. There were several cases that the Railway Company settled with.

Q. Do you know of any other accident of a similar nature that has occurred on the viaduct?

A. Yes, sir, to my knowledge, from what I heard, there were two other accidents.

Mr. Kammer: Objected to as hearsay.

The witness: I will say it in this way, there were two other accidents reported while I was a resident out there.

Mr. Kammer: I object, and ask that that answer be stricken from the record.

The Court: The objection is good, but do not strike it out.

The witness: What I want to convey is that I was not in the other accidents, but I know they had occurred.

Mr. Kammer: I ask that that be stricken out.

The Court:

Q. Did you see them, yourself?

A. No, sir.

The Court: The objection is maintained. He did not see them.

[fol. 57] Mr. Conkerton:

Q. Do you know when the viaduct originally was constructed?

A. 1910.

Q. Do you know the conditions that existed as to population in that section of the city back of the viaduct in 1910?

A. Yes, sir, very sparsely settled. In fact, there were two subdivisions first put on the market at that time. In 1910 I will say that there were not six houses constructed in Edgewood.

Q. Has there been any material change since the construction of the viaduct in 1910 to the present date?

A. I would say there was considerable. By way of comparison, I might say that the assessments in 1910——

Mr. Kammer: Just a minute, Mr. Schneider. The city assessments are a matter of public record, and I don't think this witness is qualified to testify about that.

The Court: The objection is maintained.

The Witness: Insofar as population is concerned, I may explain that at that time in 1910 there were six families in Edgewood, whereas today there is a couple of thousand. There is three public schools in that community, Edgewood, Gentilly and the parochial school. The Edgewood School has an enrollment of 850; the parochial school, over 600; I don't know what the enrollment of the Gentilly School is. I might add that when I first went out there, there was only one precinct, whereas today there is four city precincts represented by that particular district.

[fol. 58] Mr. Conkerton:

Q. Were there any electric facilities out there in 1910?

A. The line was constructed shortly after that. I don't know whether it started in 1910 or not, but the line was constructed right after 1910. When I first investigated that section, there was a bus line that the Gentilly Terrace Company operated. That was the only means of getting out there. The Villere car line at that time stopped at Seimsville. When I moved out there in 1914 we had a 24 minute headway on the Villere car line, and it extended at that time into the Terrace.

Q. Did you have any telephones out there in 1910?

A. I did not move out until 1914. When I moved out there there was telephone service.

Q. Is there any difference between the telephone service in 1914, when you moved out there, and the present day?

A. Yes, sir, there is a difference in all service now. We have practically everything out there now. We have everything but sewerage.

Q. Has it increased or decreased?

A. Increased.

Q. How is the street car service maintained?

A. I just said a little while ago that I had not been a frequent user. I live on the avenue on the corner, and I can observe what is going on, and my family use the cars considerably. We have about an eight minute headway

during the day, and the peak hours, I understand, it is four minutes.

Mr. Kammer: I wish the witness would remember that he [fol. 59] is testifying to what he knows and not what he understands.

The Court: The objection is good.

Mr. Conkerton:

Q. What was the cause of that collision or accident which you testified to, that you were in?

A. It was a foggy morning, and there is a light on a post there, at that time, just before Bay Street, or at Bay Street, where the car enters the single track, and our motorman found no lights, and put on the light, indicating that he was going over, and when we started up the viaduct, up the incline, we were almost to the top, and there was a car coming down. Due to the thickness of the fog, it was impossible for either motorman to see the other fellow until within a couple of feet of each other, when they collided. The shock was severe enough to derail the car that I was in, and the only thing that kept it on the track was the guard rail installed just a month or two previous to that time. That kept it from going over the viaduct. I might say that the accident occurred right at the ending of the mud fill on the Gentilly side. The other car that hit us was still on the trestle.

Q. Is there a mud fill the entire length of the incline?

A. No, sir.

Q. What is the other part of it constructed of?

A. It is piling.

Q. Trestle work?

A. Trestle work, yes, sir. In fact, it leaves a space on [fol. 60] either side for the street to go under. You can pass with automobiles on either side of Florida Walk.

Q. What, if any streets, are closed by the mud embankment?

A. Two closed on the river side, and I believe——

Mr. Kammer: I object. I don't know the purpose of this, but there is nothing in the petition, as I have said previously, except the allegation that the viaduct was not

constructed in accordance with the ordinance, that it has not been maintained in a safe and proper manner, that the use of it is dangerous to the public, and that one track is insufficient for the needs.

The Court: The objection to this evidence goes to the effect.

A. Two on the Gentilly side.

Mr. Conkerton:

Q. Do you know what streets they are?

A. There is Abundance and Agriculture on the Gentilly side, and Law and one other street on the other side. I am not quite familiar with the car on that side. It is after Dorgenois.

Q. What facilities, if any, have people or residents of that section of the city, or what means have they of boarding a car for the city between where the incline commences and the viaduct proper?

Mr. Kammer: It is understood that the same objection will apply to all this testimony. It is not in accordance with the pleadings.

The Court: The objection goes to the effect.

A. It is necessary on the Gentilly side for a party who [fol. 61] wants to board or alight from a car, either to walk to the L. & N. crossing or walk to Florida Walk, and go up the stairs to the viaduct, on top of the viaduct. People living in between these two points have to walk one way or the other.

Q. And on the river side?

A. On the river side there is no way of boarding cars after Dorgenois Street, except, that is the only way you can get on, at Dorgenois. You would have to cross over the Southern tracks to make that landing.

Cross-examination.

Mr. Kammer:

Q. When did this accident take place that you have made reference to?

A. 1917.

Q. And as I understand from your testimony, this accident was not caused by any unsafe condition of the viaduct itself?

A. Caused by the lights not working on the viaduct, that is what we considered brought about the accident, having come into the single track and the lights were not working.

Q. There is a single track on the viaduct?

A. Both sides.

Q. That could have just as easily happened on the single track on either side of the viaduct?

A. Yes, sir, it could have.

Q. Then, I say, the accident was not caused by any unsafe condition of the viaduct?

A. But if there was not any viaduct, it would not be nec-
[fol. 62] essary to have a single track there.

Q. But there is a single track beyond the viaduct and the Gentilly Terrace, isn't there?

A. Not now, not after you pass the L. & N.

Q. There is one between the viaduct and the L. & N?

A. Between the L. & N. and the viaduct, yes, sir.

Q. That accident could have happened on that track, couldn't it?

A. Yes, sir.

Q. In other words, that was an accident that could happen wherever cars run on a single track?

A. Yes, sir.

Q. It had nothing to do with the viaduct?

A. No, not particularly due to the viaduct.

Redirect examination.

Mr. Conkerton:

Q. Would it have been possible for that accident to happen if they had two car tracks across the viaduct?

A. No, sir, if there had been two car tracks across the viaduct, no, sir, there would have been double tracks then.

Q. Would the accident have been more serious by the accident happening on top of the viaduct, if the guard rail had not been sufficient to protect the car?

A. No doubt about it. If the rail had not held the car, everybody in both cars would have been killed, because there is nothing there but a trestle.

Q. If the accident had happened on the other side of the L. & N, the only result would have been ——

A. It would have been just two cars coming together, [fol. 63] and the damage to the cars.

JOHN BUTTONE, being first duly sworn by the Court, testified as follows:

Direct examination.

Mr. Conkerton:

Q. Where do you reside?

A. Right facing the viaduct.

Q. On what street?

A. Franklin Avenue.

Q. How long have you resided in that vicinity?

A. Going on five years.

Q. Do you know of your own personal knowledge of any accidents that have happened on the viaduct?

A. I have seen the accident that Mr. Schneider was talking about, but of course I don't know how many got hurt, but I did see when both cars hit together, and I have also seen several times,—it is a common thing to see it, but every day, even in the daytime, we see cars meet one another. One night, about half past ten, it was in October, some fellow come knocking by my door, and I got up and went to the door, and it was a motorman, He says to me, "You want to give me a hand? There is a horse under my car." I said, "All right," and I went out and went to look, and in between the front bumper and the front truck there was a red horse lying underneath there. We tried to back the car up, and it looked like the horse wasn't dead yet, because you could hear, he would groan, and [fol. 64] there wasn't a chance to leave the car go forward, and it would have to roll over, and we finished killing the horse to get him out. And another car was coming from Canal Street going back to the Terrace. Some

men went on top of the viaduct and told that conductor to transfer his passengers into the car we were getting the horse out of, and go back to Canal Street. From where this horse was lying in front of my door——

The Court: What has this to do with the case?

Mr. Conkerton: Complaint was made to the fact that the viaduct only accom-odates one track, and the service is greatly impeded. It is dangerous with only one track.

The Court: The whole story of the accident is not necessary.

Mr. Cahn:

Q. When the passengers were transferred from the car coming from the city, as you stated, to the car going to the far side, operating from the far side of the viaduct, how was the transfer of the passengers made?

A. They left the passengers off on top of the viaduct, instead of rolling the car up to the car stopped and transferring them, and told them to go down and catch that car. I don't know how many women they had, but they walked on their hands and knees on 400 feet of trestle work to get to the other car. It was half after ten at night, and when he turned his trolley to go to the city, he put the light out, and they got on their hands and knees, and one lady, I heard her say, "Look at my stocking, how I tore [fol. 65] it." I seen what I am telling you. I was there and helped to take the horse out.

Q. I show you a photograph, marked City-3, with a notation on the front of it, "Stairway to Franklin Avenue viaduct." Can you identify that location?

A. Yes, sir, from the bottom of this step to the top of the viaduct we have 42 steps, and I have got six children going to the public school every morning and coming home every evening. They have to go up the steps in the morning and evening, which makes 84 steps. These steps are filthy. It is like a toilet, and the evidence is there any day they want to see it.

Q. There is indicated here at the top of the flight of steps shown on the picture a little house?

A. Yes, sir.

Q. What is the character or use of that house, of your own knowledge?

A. Like I was saying, it is between an assignation house and a toilet, right here in this corner.

Q. Have you had occasion to note personally any occurrences up there that were objectionable?

A. Yes, sir.

Mr. Kammer: I again ask that this line of testimony be restricted. It has nothing to do with the case anyway that I can see at all. It is not in line with the pleadings. It is immaterial and irrelevant and open to objection.

The Court: I will let the objection go to the effect, but [fol. 66] you should limit that line of evidence.

Mr. Cahn:

Q. Do you know of any particular occasions, not of what you were told, but of your own knowledge, where any children or women have been frightened by negroes or white men concealing themselves at this particular location, at the head of the steps on the way to the viaduct?

A. My wife twice, on a Sunday morning.

Q. Now, that picture indicates a flight of stairs leading to a landing, where there is a little house to the right of it, and then a structure of some kind leading from that stairway upward, which appears to cross to the left. What is that structure?

A. Wood.

Q. Are those additional steps or what are they, that go up?

A. How do you mean "additional?" It leads up to the platform that the car rolls on.

Q. There is a second series of steps?

A. Yes, sir, that's the platform here and it runs up to the main platform level with the track.

Q. That's where the passengers get on and off the car?

A. Yes, sir.

Q. It is necessary, or is it necessary, in order for passengers to reach the platform, either getting on or leaving the car, to go down to this landing shown in the picture where that little house is?

A. That's the only way they can come down.

Q. What is the condition of that landing, stairways and [fol. 67] platform in rainy or wet weather and cold weather?

A. Pretty bad.

Q. Is it dangerous or not?

A. Dangerous, yes, sir, all the way through. The rails that leads from the iron structure work to the wooden work, when the cars pass, you can see the rails move up and down, and we do know that each side rail they have strapped and, well, some of the rails carry six bolts there on each end of the track, and some four, and they should have at least seven or eight bolts through those rails.

Mr. Kammer: I object to this testimony. He is trying to testify as an engineer or a structural expert.

The Court: The objection is maintained.

Mr. Cahn:

Q. Do you know of your own knowledge whether at any time any pieces of railing or other portions of the structure have been blown down?

A. Yes, sir, the whole top railing blowed down one evening, at fifteen minutes to three, and two cars behind that was when my children come from school.

Cross-examination.

Mr. Kammer:

Q. Mr. Buttone, where did you live before you went to live on Franklin Avenue facing the viaduct?

A. On St. Roch and Claiborne.

Q. Is that anywhere in the vicinity of the viaduct?

A. It is about eight or nine blocks probably, maybe a little more.

[fol. 68] Q. Is it on another street car line?

A. No, sir.

Q. You went to live on Franklin Avenue, facing the viaduct, you said about five years ago?

A. Yes, sir.

Q. The viaduct was up at that time?

A. Yes, sir.

Q. And you knew the viaduct was there?

A. Yes, sir.

Q. Now, how did you come to see that collision that you spoke of that took place on that viaduct in 1917?

A. 1917. I didn't say nothing about 1917.

Q. Didn't you say you saw a collision that Mr. Schneider spoke of?

A. In 1927.

Q. That was 1927?

A. Sure.

Q. And that's the time that Mr. Schneider was hurt?

A. Well, we are in 1929 now. I don't know if that's the same one. The one I seen was in 1927 in front of my house.

Q. On top of the viaduct?

A. It is, it wasn't right by the mud pile where the two cars met. I don't know if anyone got hurt. I knew he was in one collision, because Mr. Schneider lives back that way, and we heard——

Q. You just heard that?

A. No, I met Mr. Schneider afterwards.

Q. And when you met Mr. Schneider afterwards he told you that?

A. No, sir, I asked him if it was true.

Q. You don't know it of your own knowledge?

A. No, sir, I said I don't know whether anybody got hurt or not.

Q. That accident you are talking about was in 1927?

[fol. 69] A. Yes, sir, when the cars met.

Q. Was either car damaged?

A. No, I don't say they were damaged, but I do know they both hit together.

Q. Did you go over to where the cars were?

A. No, sir, I was on my gallery. I didn't pay any attention to it, because that happens often.

Q. You think that was the accident in which Mr. Schneider was hurt?

A. I can't say that he was in there, but when I heard that he got hurted I thought that was the one he was in.

Q. He was hurt along about that time?

A. I don't know what time it was. When this accident happened, they told me Mr. Schneider was in that car, and I asked him, and he said he was hurt, but he didn't say it was in that car.

Q. Then you don't know whether it was in that collision that he was hurt?

A. No, sir.

Q. When this horse was on the track, were you in the car at that time?

A. No, sir, I was in my house.

Q. When did that take place?

A. Saturday night, about ten-thirty.

Q. When, what month and what year?

A. I think it was in October, but I don't know the date.

Q. What year?

A. 1926, the latter part,—no, beg pardon, I think it was 1927. Now we have it right, 1927.

[fol. 70] Q. Was anybody hurt in that accident?

A. No, sir, nobody was hurt, outside of the horse.

Q. Where did that accident occur? What part of the viaduct?

A. On the side part, towards Gentilly Terrace, at the corner of Franklin Avenue and Constitution Street.

Q. Is that on the earthen embankment or the trestle?

A. Right where the mud pile stops, in front of my door.

Q. Now, the car to which the passengers were transferred, they were transferred from what car, going towards the city?

A. No, sir, the car coming from the city going towards the Terrace.

Q. They were transferred?

A. Yes, sir.

Q. Where did that car stop?

A. On the tip top of the viaduct.

Q. Couldn't those passengers have gone down the stairs?

A. I suppose they could if they wanted to, but probably they didn't know it. Lots of people are not familiar with those steps. I see people walk in the other direction and the conductor makes signs to them.

Q. There is a light up there?

A. Only when my father lights them. When he don't light them, there is no light.

Q. Why does he light the lights?

A. Because he has the key to light them lights. If he wouldn't ask for that key, my children, or maybe my wife, going up and down that steps in the dark, and we wouldn't know who is on top of the viaduct, because there is always [fol. 71] a bunch of tramps and hoodlums waiting for

trains, and they hide so the detectives on the railroad don't see them. And we used to light the lights ourselves.

Q. Did you put the lights up there?

A. The electric globes, the company use- to furnish us with globes, and the boys used to shoot them, and we wouldn't have extra ones, and we used to take our own.

Q. What boys were those that used to shoot the globes?

A. They were boys from other neighborhoods, most of them.

Q. They were not your boys?

A. They were all girls, outside of one boy six years old, and he has no rifle.

Q. When was the railing blown down?

A. In September, in the same year.

Q. 1927?

A. Yes, sir, the same year.

Q. When you speak of the railing, what do you mean?

A. The hand rails, all around, like this railing around that step there (indicating the jury box).

Q. On the stairs?

A. No, sir, on the topmost platform, where the car leaves the passengers off.

Q. Isn't there a steel superstructure up there?

A. No, sir, the wood rail I am talking about. A wooden frame with a square mesh half inch wire nailed to it, and a bench on both sides.

Q. The rail is behind the bench?

[fol. 72] A. Yes, sir, the bench is nailed against the railing. It is a 2 by 10.

GEORGE J. DINKEL, being first duly sworn by the Court, testified as follows:

Direct examination.

Mr. Cahn:

Q. Where do you live?

A. 2540 Wisteria.

Q. What business are you in?

A. Automobile tires.

Q. Have you any personal knowledge of an accident that occurred at or on the Franklin Avenue viaduct, at which time a Mr. Schneider, residing at 4030 Franklin Avenue, sustained injuries?

A. Yes, I do. October 8th, 1917, at seven a. m. I happened to be on the same street car as Mr. Schneider. Two cars met exactly where he said, just above the mud approach, and both were derailed. I think the reason was cross signals during fog. I sustained what might be known as a broken nose, which you have plain evidence of, and today am still an ailment to that particular cause.

Q. Has any other accident occurred at or on that viaduct within your personal knowledge since that date?

A. Not on the viaduct proper, but on the single track.

Q. There is only one track across the viaduct?

A. Yes, sir. I mean at different locations on the ground, [fol. 73] where one car met another one coming off the switch.

Q. You have occasion to use the street cars in that section?

A. Not every day for the past two years, but previous to that I was formerly an electrician and used the street cars there.

Q. Was the service in any way impaired by reason of the fact that there was only a single line track a portion of the way up to the viaduct, across the viaduct and for a little distance on the far side of the viaduct?

A. Yes, sir, it was a common occurrence to have both cars meet on the viaduct and to have an argument which one was to back up.

Q. How long have you been living in that section?

A. Seventeen years.

Q. Have there been any radical changes of any kind in the conditions in that section since you went to live out there?

A. It has had what you might call a wonderful growth. We were five families residing in Edgewood and I think they have a few thousand homes today.

Q. Has there been a similar development in Gentilly and other sections adjacent to Edgewood?

A. I think so. In Forest Park subdivision and Gentilly.

Q. Were there any material comforts, in the way of gas supplies, telephone or electric light, were there any such facilities when you moved out there?

A. When we moved out there in 1911, about seventeen years ago, we had no electric light, gas or street lights, or any convenience whatsoever. Today we have everything [fol. 74] in abundance.

Q. Has the population in that section increased very materially?

A. Wonderfully.

Q. Has the increase in transportation on the Villere line, this line that serves the people across the viaduct, increased materially?

A. A great deal. They put on extra large cars, and when we first moved out, they had small cars.

Q. Has there been any noticeable or appreciable delays in service due to the necessity of holding one or more cars on one side of the viaduct to permit the passage of other cars across?

A. I have noticed that in driving by with an automobile in the last two years,—that is an occasional sight to see three cars waiting on one side until a few get over on the other side. I don't ride them, but I could see that, because we drive out that way.

Q. Have you any personal knowledge of any conditions affecting or concerning the use of these steps and the platform and the passenger platform on the top of the viaduct, testified to by Mr. Buttone?

A. I think that question was well covered.

Q. Do you know anything of it, yourself?

A. No, you see, I don't use it.

Cross-examination.

Mr. Kammer:

Q. Mr. Dinkel, how often have you seen three or more cars waiting at the approach of the viaduct for other cars? [fol. 75] A. I could not give you any definite answer on that. I have seen it enough to know it is a common occurrence,—mostly between 6:30 and 7:00 o'clock coming in.

Q. At night?

A. Yes, sir.

Q. And you haven't any idea how long those cars waited?

A. No, I have not.

Q. You just saw cars there on your way passing by?

A. I know they must have been there a while.

Q. You were only passing by in your automobile? You don't know whether they were run there at one time and stopped or piled up there?

A. No, but I assumed it.

Q. We don't want any assumption, but just what you know.

JOHN TRASCHER, being first duly sworn by the Court, testified as follows:

Direct examination.

Mr. Cahn:

Q. Where do you reside?

A. 2007 Almonaster Avenue.

Q. What is your business?

A. Locomotive engineer.

Q. Is your residence anywhere within the immediate vicinity of the Franklin Avenue viaduct?

A. No, it is about six or eight squares from there.

Q. Have you had any occasion to visit the neighborhood of the Franklin Avenue viaduct within the last few months?

A. Yes, sir, I am putting up a house at Franklin Avenue and Abundance Street by the switch. I have been out there for the last four months.

[fol. 76] Q. How long have you been living in that section of the city?

A. About seventeen or eighteen years.

Q. Are you familiar with the conditions that existed in that section of the city prior to and at the time the viaduct at Franklin Avenue was constructed?

A. Yes, sir.

Q. How did the conditions at that time compare with the conditions at present?

A. Just about a hundred per cent improvements put there. It was a swamp hole when they first put the viaduct there.

Q. Do you know whether there has been much increase in residence and the population?

A. Yes, sir, a considerable lot.

Q. Any increase in facilities for gas, telephone, electric lights and things of that kind?

A. Yes, sir, I am putting up a residence back there on Franklin Avenue and Florida Walk and have gas, electric light, water, sewer and everything.

Q. Within the last few months, say from two to four months, have you had occasion to notice whether or not the New Orleans Public Service has been doing any work of repairs on the viaduct?

A. Yes, sir, I noticed some reinforcing, some construction work there, piling and different things.

Q. Have you had occasion to notice recently whether or not there have been any cars held up or any delay in street car service along and across the viaduct?

[fol. 77] A. Yes, sir, I noticed that in the last four months daily. Took a notation of it and called attention of some of my employers, "Look at the time that we working men have to wait before we get to work."

Q. Have you had occasion to notice the method used or what is done by the motormen and conductors operating cars, when they reach the viaduct or the top part of the incline, what precautions they take to look for cars coming in the opposite direction?

A. They have a switch light right in front of the building I am putting up, and that switch light probably don't work, and he gets out and looks,—gets out in the neutral ground and looks to see if a car is coming up. That happened Friday last. I saw him with my two eyes. If there is no car coming down, the conductor gives a sign to go, and sometimes they notice another car coming and they back up.

Q. You have seen that on more than one occasion?

A. Yes, sir, pretty often, and I taken a notation of it, too.

Q. You stated that you were a locomotive engineer. On what road are you employed?

A. I have been employed on the Northeastern and now with the Southern. I have been there 27 years.

Q. Were you employed by the Southern Railway or any of its allied lines at the time this viaduct was constructed across Franklin Avenue?

A. Yes, sir.

Q. Do you know of your own knowledge anything rela- [fol. 78] tive to, as to where the Public Service or the Railway & Light Company, at that time, obtained the structure that forms the viaduct across the tracks of the Southern Railway?

A. Yes, sir, that bridge was removed from Pearl River, given to the Public Service, as I think it was too light for the traffic of the steam railway, and they put a larger bridge there, and gave that to the Public Service.

Q. You are sure that that structure is the structure that at one time served as a bridge for the Southern Railway at Pearl River?

A. It was the Northeastern, yes, sir.

Cross-examination.

Mr. Kammer:

Q. Mr. Trascher, when you spoke of the cars waiting at the end of the viaduct, what time was that, day or night?

A. That happened about in the morning, about seven or seven-thirty o'clock.

Q. Going which way?

A. Up towards town.

Q. Coming towards the city?

A. Yes, sir.

Q. Do you ride on that line?

A. I rode once, had occasion to ride once on that line.

Q. You use an automobile?

A. Yes, sir.

Q. You are erecting a house, you say, on Franklin Avenue facing the viaduct?

A. It is at the foot of the viaduct.

Q. What street is that?

A. Abundance Street, right in front of the switch.

[fol. 79] Q. Down near the L. & N. crossing?

A. Yes, sir.

Q. You have been living in that section of the city, you say, about seventeen years?

A. Well, not in that section. I have been living on Almonaster Avenue for seventeen years.

Q. You said Almonaster Avenue was six or seven squares from the viaduct?

A. Yes, sir.

Q. Wouldn't you call it in that section of the city?

A. I thought you were referring to the section where I am erecting the building.

Q. You knew the viaduct was up there?

A. Yes, sir.

Q. And you have recently purchased a lot and are building a house just at the foot of the viaduct?

A. Yes, sir.

Mr. Cahn: At this time, counsel for the city offers, introduces and files in evidence, in connection with the testimony of the witnesses who have heretofore identified the photographs, concerning which they have testified, said photographs numbered City-1, City-2 and City-3, respectively.

[fol. 80] Frank Krass, Jr., being first duly sworn by the Court, testified as follows:

Direct examination.

Mr. Cahn:

Q. Where do you live?

A. 2810 Franklin Avenue.

Q. Is that anywhere in the immediate vicinity of the Franklin Avenue viaduct?

A. Yes, sir, right at the viaduct.

Q. What business are you in?

A. In the plumbing business.

Q. In asking you such questions as may be propounded to you by the City Attorney, we want you to confine your answers to facts within your personal knowledge and not what you have heard or have been told?

A. Yes, sir.

Q. I want to ask you whether or not you have any knowledge or information as to any accident that occurred on or at the viaduct?

A. Well, a lot of accidents occurred, as a horse getting run on top of by a car,—that's all I know of.

Q. You were never in any accident, yourself?

A. No, sir, I don't use the cars.

Q. Have you ever seen any cars meet on the single track, either on the approaches of the viaduct or on the viaduct, itself?

A. Well, on the mud part of the viaduct, I did see them, yes, sir, several times, but I didn't pay no attention to it. They just backed down and let one another pass.

[fol. 81] Q. There were no collisions?

A. No, sir.

Q. Have you seen within comparatively recent times, say, within three or four months, any repairs being made to the viaduct by the crews of the Public Service?

A. Yes, sir.

Q. They have had large crews at work there?

A. I should say about twelve men.

Q. Have you had occasion to note any facts in connection with children playing or using the viaduct?

A. That is the trouble with the viaduct with me, me chasing the kids off the viaduct.

Mr. Kammer: I object. That is not a question of the danger of the viaduct, the danger of operation or anything else. Boys will play on tracks. They climb on freight cars and things of that sort all over New Orleans.

Mr. Cahn: We withdraw the question.

Q. Are you familiar with the conditions that existed at the Franklin Avenue viaduct in connection with this stairway and landing and little house adjacent to the landing, on photograph City-3?

A. Well, I don't use the steps very much.

Q. You don't have occasion to use the steps?

A. Very seldom, just when my car is broken down.

Q. Do you know anything about the condition of those steps and landings, the conditions down here?

A. It has been a year or so since I used them, since we had the last storm.

[fol. 82] Q. Have you any knowledge personally of that location, meaning the landing at the top of the first flight of steps, and the little house there, or on the top of the

viaduct, being a rendezvous for tramps and negroes at night time?

A. Yes, sir, all around out there. They use the whole viaduct.

Cross-examination.

Mr. Kammer:

Q. How long did you say you have lived out there?

A. Three years.

Q. Do you remember when it was that this horse was hit by the car?

A. No, sir, I don't.

Q. Do you know what year it was?

A. No, sir. It was a cold night in the winter time. I just come out and they asked me for help, and I said, "Help yourself."

Q. Do you use an automobile?

A. Yes, sir.

Q. Where is 2810 Franklin Avenue in respect to the viaduct?

A. It is right where the mud starts, going out to the Terrace.

Q. On the Terrace side of Florida Walk?

A. Yes, sir.

Q. Down near the L. & N. crossing?

A. No, sir, up this way further.

Q. Near the Southern Railway yard?

A. Yes, sir.

Q. What street is that, about?

A. That is Agriculture there.

[fol. 83] Redirect examination.

Mr. Cahn:

Q. Is Agriculture Street closed at that point?

A. It is closed with the piling. You have to cross through under the piling. I have to go two squares further to get to my home.

At this point the Court adjourned for the day, and this case was continued to Wednesday, January 9, 1929, at 10:30 a. m.

January 9, 1929.

E. GUEDON, being first duly sworn by the Court, testified as follows:

Direct examination.

Mr. Conkerton:

Q. Where do you reside?

A. 2507 Franklin Avenue.

Q. Is that at or in the vicinity of the Franklin Avenue viaduct?

A. It is at the corner of Dorgenois, where the signal light is, going over towards the Terrace end.

Q. Approximately how far is it from the viaduct proper?

A. From my house, you mean, from the viaduct approach end? About three blocks, that is, including the intersection of Agriculture,—I mean, Constitution Place.

Q. How long have you resided at 2507 Franklin Avenue?

A. Five years.

Q. During that period of time have you had opportunity to observe the operation of the street cars over the viaduct?

A. I have seen a great deal of it, yes, sir.

[fol. 84] Do you know anything regarding the signal light to notify the approach of a street car from the opposite direction?

A. That is the light on the post at the corner that I just spoke of.

Q. In what manner is that signal light operated during the time you have lived at 2507 Franklin Avenue, of your own personal knowledge?

A. It has been out of order a great many times. I cannot say how many. An awful amount of times I have seen the trouble shooter out there repairing it.

Q. As a result of that light being out of order, has any confusion arisen in cars crossing the viaduct?

A. A great many times I have seen a car get half way or three quarters up the viaduct and have to back all the way down to let the other car come over the viaduct.

Q. I show you a photograph marked Plaintiff-1, already introduced in evidence, and ask you if you recognize that photograph or what it represents?

A. Yes, sir.

Q. What does it represent?

A. It shows the viaduct, it starts from Dorgenois Street, looking towards Gentilly Terrace, and also shows that the street has been narrowed here on account of the mud embankment, to an extent, I don't know how many feet, but I know it is a great deal narrower at this point than at Dorgenois Street.

Q. What is that house shown at the corner?

A. That is my home.

[fol. 85] Q. I show you another photograph, marked City-4, and ask you if you recognize what that photograph shows?

A. That is the narrow section of it, at the bulkhead of the mud embankment, looking towards Gentilly Terrace.

Q. What side of the street does that photograph show?

A. The downtown side.

Q. What cause or effect has the mud embankment spreading into the street had on automobile traffic?

Mr. Kammer: I object to the question. It has nothing to do with the viaduct itself, and there has been no evidence to show that the viaduct was not constructed in accordance with Ordinance No. 6445, N. C. S., and any testimony of this character, with regard to automobile traffic, is immaterial and irrelevant.

The Court: The objection goes to the effect.

A. It does not give the traffic proper space to come through.

Mr. Conkerton:

Q. To your own personal knowledge, has there been any accident in that vicinity?

A. There have been two accidents at that point.

Q. When?

A. I think in 1926, I think, or 1927, rather, in October. On a Friday night there was a Ford automobile coming in, because the other side of the street was not completed paving, and this young fellow, whoever he was, figured the street was wide all the way.

Q. Testify only to what happened?

A. He came through and hit the mud embankment.

[fol. 86] Q. There was another accident? What happened on that occasion?

A. On the following Monday night, another automobile was going out towards Gentilly Terrace and struck a rock or boulder that had rolled off the viaduct. He upset the Ford, it was upside down.

Q. Are those rocks still on the viaduct?

A. There is very few, not many, they were moved. The Pontchartrain bridge took them.

Q. Was any signal ever kept on that jutting portion of the street?

A. After that first accident they put a red light on the bulkhead there, but after two weeks the light wasn't there any more.

Q. Is that light or any signal of any kind kept there today?

A. Not to my knowledge. I haven't seen any.

Q. If any was kept, could you see it?

A. After you get on top of it, a very dim little red light, a red lantern.

Cross-examination.

Mr. Kammer:

Q. Mr. Guedon, you say that car crossed the signal at the Dorgenois end of the approach and that it had gone half way up the viaduct and then had to back down. Did I understand your testimony to be that?

A. Yes, sir.

Q. Do you know how those signals work?

A. I noticed when a car hits a certain spot in the middle of the block before that, it automatically flashes on, that's the way it appears to me. There is a red light and a white [fol. 87] light. I haven't gone into it in detail to find out the purpose.

Q. When you spoke of a car going half way up the viaduct, do you mean half way up the embankment where the approach is, where it is filled, or on the trestle?

A. What would you constitute the viaduct, from Dorgenois Street to the other end, or how?

Q. I would say the viaduct itself was from one end, say, Dorgenois Street, to the other end, where it gets down to the level. That viaduct, as I understand it, is composed of several hundred feet of embankment approach before you get to the actual trestle, approaching the steel bridge, going over the Southern Railway tracks, is that right?

A. Yes, sir.

Q. Now, these cars that you spoke of, had they gotten on the trestle or were they still on the embankment?

A. Yes, sir, some were to the bridge, I have seen them, before they had a view of the other fellow coming up.

Q. How long ago was it that that happened?

A. That is very frequent. I couldn't say just how long. It is a common occurrence.

Q. You don't know when the last time was when you saw a car do that?

A. I could not say.

Q. Was it last year?

A. I wouldn't venture to say that. It has been so frequent.

Q. You have lived out there five years and been observing that, and you don't know whether this thing has hap-
[fol. 88] pened in the last year or the last two years?

A. I have no memorandum or anything, other than to tell you it has been so numerous that I could not give the last time or any particular time.

Q. Do you know what time, in the day or at night, this thing is supposed to have happened?

A. No, sir.

Q. Are you out there during the day?

A. Sometimes.

Q. And you don't know whether it happened in the daytime or at night?

A. Sometimes in daylight and sometimes at night. I have seen it at night also. I can recall one stormy night, I think in April, a car got up the viaduct and stopped in front of my house. The motorman hollered to the conductor, "Say, do you think we ought to take a chance and go over?" There was a windstorm.

Q. Doesn't that show they are cautious in a windstorm?

A. His reasons, I guess, was minding the passengers in the car.

Q. Doesn't that show evidence of cautiousness?

A. I couldn't say that it was not caution. It was fright on the part of the motorman.

Q. That windstorm was in April of what year?

A. I think 1927 or 1926. 1927, I am fairly sure.

Q. Is that the only time that you definitely remember such an occurrence?

A. That I have heard the motorman say that, myself, yes, sir.

Q. Now, you say this car stopped in front of your house? [fol. 89] A. Yes, sir.

Q. That is not the one that you are speaking of that had gone up the viaduct and came back down?

A. Certainly, it could not be.

Q. Do you know the distance from the Dorgenois end of the approach to the steel bridge?

A. No, sir.

Q. You haven't any idea?

A. No, sir.

Q. Now, you have spoken of two automobile accidents, and this question is asked subject to the objection I have made to this character of evidence, that automobile accident was when a car was going toward the city on the downtown side of the roadway? At that time the roadway was used as a two way street?

A. Yes, sir.

Q. At that time the lower side was paved and they were still paving the upper side?

A. Yes, sir.

Q. That necessitated traffic both ways using the lower roadway?

A. Yes, sir.

Q. Traffic today flows in which direction?

A. It is a one way street. They keep to the right.

Q. They keep to the right going toward Gentilly Terrace on the lower roadway?

A. That is a one way drive. That is a boulevard.

Q. Now, how far could you see the embankment with the headlights on an automobile going toward the city?

A. I can't say that. I have never had occasion to drive [fol. 90] that way to find out.

Q. Do you know the width of the bridge over the canal down there by the Southern Railway tracks?

A. No, sir.

Q. Do you know whether that bridge is any wider or narrower than the roadway at the point where the embankment touches the road?

A. The top of the viaduct bridge itself?

Q. No, the bridge over the canal, the automobile bridge?

A. That's a lot wider than the narrow part of the viaduct.

Q. How much wider?

A. Why, it is lots wider.

Q. Ten or fifteen feet?

A. It may be twice as big. I know it is twice wider.

Q. What is your idea of lots wider?

A. Possibly that bridge may be thirty feet, maybe thirty-five.

Q. That is your idea of the width of that bridge?

A. I haven't measured it with a rule or anything. If you might show me one of the pictures, you might see there the distance that will show how much wider the bridge is than the embankment.

Q. You want to see the picture?

A. Not necessarily. You might be able to gauge it from that.

Q. Where did the other accident occur?

A. The same point.

Q. Which way was that automobile traveling?

A. Going out.

Q. And he hit that end of the embankment on the left [fol. 91] side of the roadway?

A. No, sir, he struck a stone, the second accident.

Q. That had nothing to do with the embankment?

A. The rock had formerly been on the embankment. I don't know whether the vibration of the cars or what rolled it off. It was in the street. I have moved quite a few and all. There was an awful amount before the Pontchartrain people secured the rocks for their bridge. Ford, Bacon & Davis, I was speaking to them about moving the stones.

Q. You say that Ford, Bacon & Davis removed the rocks?

A. No, sir. They asked estimates on the moving of the

rocks to the Pontchartrain bridge, and I happened to figure on it, and didn't get the contract, but I know who did, and that's how I know where the stones went.

Q. Do you know who they bought those stones from?

A. No, sir, I couldn't say. I understand, from an engineer of Ford, Bacon & Davis——

Q. Don't say what you understand. That is not competent testimony.

The Court: Say only what you know yourself.

Mr. Kammer:

Q. Do you know how long those rocks were on that embankment?

A. Not exactly. Approximately three or four years.

Q. Do you know how they got there?

A. They were dumped there by the Public Service.

Q. Do you know where they came from?

A. No, sir.

[fol. 92] Redirect examination.

Mr. Conkerton:

Q. I show you another photograph, marked City 5, and ask you to tell me, if you can, what that photograph represents.

A. That appears to be the other side of the bridge, towards Gentilly Terrace.

Q. Viewing that photograph, does or does not the same condition exist in automobile traffic that existed with reference to the accident that you described, occurring when they were only using the lower side of Franklin Avenue?

A. Yes, sir. The same condition exists on each side, which would give a fellow going out one way the same chances of striking it as a fellow on the wrong side of the street.

Q. In other words, a man driving out to-day encounters the same difficulty that the man driving in did at the time of the accident you referred to?

A. Yes, sir.

Q. The mud embankment on the lake side of Florida Walk——

A. On each side of the viaduct.

Q. Extends likewise into the street?
A. Yes, sir.

Recross-examination.

Mr. Kammer:

Q. Do you know from what position this photograph, City 5, was taken?
A. What position?
Q. Yes.
A. It appears to be taken on the right hand side or lower [fol. 93] side of the viaduct, on the other side of the canal.
Q. You mean that the position of the camera was on the lake side of the Southern Railway tracks, is that your idea?
A. It may have been on the tracks.
Q. Looking towards the lake?
A. That's the idea.
Q. Do you know whether that picture was taken from the uptown side roadway or lower side roadway? There are two sides to that roadway.
A. That was taken on the downtown side.
Q. Who took that picture?
A. Mr. Franck, I presume, or one of his representatives.
Q. Were you there?
A. No, sir. I ordered the pictures taken.
Q. You weren't there when the picture was taken? Therefore, you don't know whether it was taken with the camera placed at the uptown side of the roadway or the downtown side of the roadway?
A. Well, I recognize this corner.
Q. You recognize the corner? What do you mean by "this corner"?
A. The curbstone that forms the intersection.

The Court: That picture shows which side it was taken on. It was taken from this side.

Mr. Kammer:

Q. You say that you recognize the corner? What corner have you reference to, the corner of the embankment or the street corner, or what?

A. That appears to be the corner of—I know now. Here is the L. & N. tower. That proves the side it was taken on.

Q. I understand you to say that it was taken on the [fol. 94] lake side, taken from the lakeside of the Southern Railway tracks, or on the tracks, looking toward the lake? That is not what I am getting at. I am asking where the kodak was placed when the picture was taken?

A. Well, I wasn't there, sir.

WALTER MIESTER, a witness on behalf of the plaintiff, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Conkerton:

Q. Where do you reside?

A. 3524 Gentilly Road.

Q. Are you familiar with the Franklin Avenue viaduct?

A. Yes, sir.

Q. How long have you resided in that section of the city?

A. In that section practically all my life.

Q. How long have you resided at the Gentilly address?

A. Four months.

Q. Where did you reside prior to that?

A. At 2340 Franklin Avenue. I had two other addresses, Mandeville and Villere, and St. Claude and St. Roch.

Q. How long did you reside at 2340 Franklin Avenue?

A. Four years.

Q. Is that at or in the vicinity of the Franklin Avenue viaduct?

A. It is in the vicinity.

Q. How close to the Dorgenois Street end was that?

A. One block.

Q. Nearer the lake or nearer the river?

A. I don't know just what you mean. It was one block [fol. 95] from Rocheblave to Dorgenois. No. 2340 was the corner of Rocheblave.

Q. During your residence on Franklin Avenue, did you have an opportunity to note traffic across the viaduct?

A. I did.

Q. Do you know of your own personal knowledge of any accidents having happened on the viaduct or its approaches?

A. No, sir.

Q. Do you know what condition existed at the Southern Railway crossing? Do you know when the viaduct was first erected?

A. Yes, sir.

Q. When?

A. 1910.

Q. Do you know what condition existed at the Southern Railway crossing as to the use of the steam railway lines?

A. The Southern Railway parked their cars across Franklin Avenue. It was blocked, closed the street at Florida Walk or Constitution Place, and cars were parked across Franklin Avenue.

Q. Has there been any change in the conditions since that time to the present day?

A. Yes, sir. Franklin Avenue has been opened and the Southern Railway now breaks their cars and parks them on either side of Franklin Avenue.

Q. Comparing the Southern Railway crossing at Franklin Avenue and the L. & N. crossing at Franklin Avenue, what difference, if any, is there in the condition as to the use by the railroad companies to-day?

A. The same condition exists to-day.

[fol. 96] Q. When you say the same condition, exactly what do you mean?

A. I mean this, that the L. & N. never did block Franklin Avenue. They had no yard there. They only used their track for through traffic, while the Southern originally blocked Franklin Avenue. Now both streets are open. The L. & N. has now a tower and signal gates, and before they were erected the L. & N. trains went through there at high speed. Now they slow or stop. The Southern Railway trains, freight and passenger, except switch trains, have always stopped at Franklin Avenue.

Q. How many main line tracks are there at the Southern Railway Company crossing on Florida Walk?

A. Two.

Q. How many switch line tracks are used?

A. There are six.

Q. Are they used as much to-day as they were in 1910, I think you said?

A. From my observation, no.

Q. How many main line tracks are there at the L. & N. crossing?

A. Two.

Q. How many switch tracks?

A. One.

Q. Then, from your testimony, what condition if any exists to-day, or what difference in conditions exists to-day between the two crossings as to the use of the tracks?

A. As to the use of the railroad tracks?

Q. Of the Southern and L. & N. railroads?

A. The difference exists in this way, that as far as the street railway crossing is concerned the L. & N. has improved it with gates and a tower. And as far as the [fol. 97] Southern Railway is concerned, the street railway in the early days couldn't pass there because it was blocked. They could cross there now with the same precautions taken at the L. & N. crossing.

Q. What maintenance, if any, to your personal knowledge has the Railways Company made of the viaduct since its erection in 1910?

A. To my knowledge, during the four years I lived in that vicinity. I couldn't see very much work done on the viaduct, but in 1926, and when the petitions were made to remove it, there was considerable work done, or rather some attention was given to it prior to that time, and in the last two months there has been a great deal, just previous to this trial, a great deal of work done. There have been crews out there about two months.

Q. How recent has this work been done?

A. I should say about two months steady, maybe three.

Q. When this suit was filed, do you know when this suit was filed?

A. Not the exact date, no, sir.

Q. Do you know what year?

A. The ordinance was passed——

The Court: The record shows that, Mr. Conkerton.

Mr. Conkerton:

Q. I show you the photographs already introduced in evidence, marked City 1 and City 4, and ask you if you recognize those photographs, what they represent.

A. One is the view taken just a little this side of Dorgenois Street and toward the lake on the lower side, that is No. 1. This one, marked 4, is on the same side of the street, [fol. 98] looking the same way, taken beyond Dorgenois Street.

Q. Do you know how much of the street, or how much the street is narrowed by the earthen embankment extending into the street?

A. In feet, no, sir. I never measured it.

Q. Can you tell approximately?

A. From Dorgenois Street, as I judge, as it extends out, I should judge about ten or twelve feet to the narrowest point. That's where it cuts into the roadway.

Q. You judge it narrows it down ten feet?

A. Approximately, yes, sir.

Q. Comparing the crossings of the New Orleans Public Service at St. Louis and Claiborne and at Franklin Avenue and Florida Walk, what difference, if any, exists?

Mr. Kammer: I object to that question. I don't think it is material or relevant.

The Court: The objection is maintained.

Cross-examination.

Mr. Kammer:

Q. Mr. Miester, where did you live in 1910?

A. I lived at 825 Port Street.

Q. How far is that away from the Southern Railway tracks as they cross Franklin Avenue.

A. About fifteen blocks.

Q. At that time was Franklin Avenue open to vehicular traffic?

A. No, sir.

Q. It was not?

A. No, sir, it was not.

Q. How did you get to the Southern Railway crossing at that time?

[fol. 99] A. Drove out Franklin Avenue to about Galvez, I judge, and walked the rest. That is as far as a vehicle was concerned. The street cars also, I think, at that time just about went that far.

Q. That was before the viaduct was erected?

A. Yes, sir.

Q. And then what would you go out to the Southern Railway crossing for?

A. I was in the fire insurance business, general insurance. I had occasion very often to go all through out there as houses were built. Sometimes, well, it was just a question of my work that brought me there. I was on the street all the day.

Q. At that time, wasn't it far easier to get to the other side of the crossing by way of Gentilly Boulevard?

A. No, sir, it was not. It just brought you about the same distance. As far in as you could get on the other side was about Bay Street.

Q. Going from Gentilly Boulevard towards the river?

A. Going from Gentilly Boulevard towards the river.

Q. And you went in that section between Bay Street and, you said, Port Street?

A. No, Franklin Avenue.

Q. Galvez Street?

A. Galvez Street.

Q. You went in that section numerous times getting fire insurance?

A. I have had occasion, yes, sir. I have walked from this side to the Gentilly side in preference to going to Frenchmen Street.

Q. Were there any sidewalks?

[fol. 100] A. No, sir. Some sections, but not continuous.

Q. You say at that time the Southern Railway used to park cars across Franklin Avenue?

A. They did, sir.

Q. There was nothing to interfere with their parking cars across Franklin Avenue, no traffic of any kind?

A. Not to my knowledge. Not whatever.

Q. If the street car line had been built out Franklin Avenue on the grade, they would not have been able to park their cars that way?

A. They wouldn't have.

Q. And they continued parking their cars across Franklin Avenue until what time?

A. Sometime during the Maloney administration. I don't remember the date.

Q. Was the street passable for vehicular traffic at that time?

A. Well, it was bad, but it was passable. The city filled in a great deal to make an open roadway. When the Maloney ordinance was introduced, opening Franklin Avenue, the city had some filling put there. For a while you could use it when it was very dry, and traffic found its way little by little that way. When it was wet you could not use it.

Q. It was during that time that the Southern Railway stopped parking cars across the Franklin Avenue roadway?

A. Yes, sir, with this exception. At times they first broke them just a slight bit to let people across and gradually, when protests were made, they finally parked them on either side of the Avenue.

[fol. 101] Q. What has this line of testimony you are giving got to do with the Franklin Avenue viaduct?

A. It has this to do. That viaduct was not built as a means of getting the car line over the tracks from the standpoint of a grade crossing, but because the Southern Railway objected to the street railway crossing on grade.

Q. For what reason?

A. They were using,—I presume, I don't know,—they were using,—they did state, and what I read up in the record, they were using the ground as a parking space and didn't think the time was ripe to give it up.

Q. They were using the public street at that time?

A. They were.

Q. And that, you say, is the reason why the city compelled the Public Service to viaduct the crossing?

A. That is from my examination of the records.

Q. In order to permit the Southern Railway to park its cars across Franklin Avenue?

A. Yes, sir, that is what I tell you.

Q. And you say there are two main line tracks and six switch tracks at Franklin Avenue?

A. Yes, sir.

Q. I also understood you to say there is not as much switching and traffic backward and forward across Franklin Avenue today as in 1910?

A. Yes, sir.

Q. How do you account for that?

A. Just by my observation. In 1910 and when I lived on Franklin Avenue, there was always solid from four to six [fol. 102] tracks of cars always there. In the last three or four years, I have passed any number of times, and find sometimes no cars whatever, sometimes one or two tracks, and sometimes there are none.

Q. Isn't it a fact that the cars are being constantly moved and switched, whereas formerly they parked them there?

A. I can't answer that. They might switch them, but they have to break them at Franklin Avenue, and it cuts down the space they had to park and switch.

Q. I am speaking now of the movement of trains switching cars?

A. When they parked them, they switched them there. It is a part of switching.

Q. They have to switch them in order to put them on the parking tracks or side tracks?

A. That is what I had reference to. That has diminished.

Q. That is the placing of cars on those tracks, but would you say that the movement of trains backwards and forwards across Franklin Avenue has diminished?

A. I would not.

Q. You don't know, then, whether the movement has increased or diminished across Franklin Avenue?

A. You mean through freight?

Q. All kinds of switching across Franklin Avenue, switching, through freights and passenger?

A. As a whole, I think it has diminished.

Q. You don't think the Southern Railway, then, is doing as much business now as it did in 1910?

A. I didn't answer the question that way. I say the number of cars parked and switched in out there will make [fol. 103] up for any increase in their business. They used to park from six to four solid lines of cars all the time. They don't park them there now. That decrease in cars

switched in there and parked, I take it, as a whole will diminish the switching at that point.

Q. You think, now, that practically no cars are parked in that yard?

A. It has diminished considerably. I have seen as many as three or four days when there weren't any from St. Roch to Press Street. I know that prior to that time they were always there.

Q. Now, you say that at the L. & N. crossing there are two main line tracks and one switch track?

A. I may be wrong on the one switch track, but the two main line tracks I am positive of.

Q. Would you say that the traffic over the L. & N. at the Franklin Avenue crossing had increased or diminished since 1910?

A. I would say it increased.

Q. How do you account for that?

A. The natural increase in the L. & N. business, especially the passenger end.

Q. There has been no natural increase in the through movement of trains over the Southern Railway?

A. I have ridden a great deal on the passenger trains to Covington, and I can't say there has been. I don't know anything about the freight.

Q. You would say the passenger trains have not increased to Covington?

[fol. 104] A. From my observation.

Q. What about the passenger trains going east?

A. I have no knowledge of that.

Q. You don't know whether they run more passenger trains today than in 1910?

A. I do not.

Q. Do you know what trains use the Southern Railway tracks?

A. The number of trains?

Q. The different roads?

A. All I know is the Southern Railway and the New Orleans Great Northern.

Q. There are two railroads using those tracks, then?

A. Yes, sir.

Q. And both of those roads are using those tracks for both freight and passenger trains?

A. I don't know.

Q. Do you know of any other way the Southern gets out of New Orleans?

A. I do not.

Q. Now, I understand you to say that the Southern Railway trains, with the exception of switch trains, always stopped at Franklin Avenue?

A. I did.

Q. You mean that the through passenger trains stop there?

A. Yes, sir.

Q. Do you know what the purpose of that is?

A. There is a single track at Press Street and a very sharp curve,—one track. They always come into the one track, stop at Franklin Avenue to work into this one track. [fol. 105] One track is at Press Street?

A. One track is at Press Street.

Q. And how far is Press Street?

A. About two blocks.

Q. They have to stop the trains to run on the single track?

A. Yes, sir.

Q. The through trains don't go straight through, then?

A. No, sir, those I have observed have stopped.

Q. How often have you observed them?

A. Very often. I have been in that neighborhood all hours of the day. I pass there any number of times. My work carries me around there probably three or four days, all different hours, and I have observed them as I passed, being interested in this case.

Q. As I understand your testimony, every through train or every train, except trains switching cars, every train crossing Franklin Avenue on the Southern Railway tracks stops?

A. Yes, sir.

Q. A dead stop or just slow down?

A. Most of the time to a dead stop. Sometimes the flagman hops off and runs ahead and throws the switch, or whatever he does. I have observed them doing that. I have been on the train possibly thirty times to Covington

and every train I was on stopped dead at Franklin Avenue, and also three blocks above the L. & N. crossing?

Q. Do those trains stop both ways, going and coming?

A. One stops on the other side of Press Street.

Q. I am speaking now of the crossing at Franklin Avenue?

A. The in train does not stop at Franklin Avenue, no sir. It goes very slow though.

[fol. 106] Q. It is only the trains going from the city that stop?

A. The in train stops the other side of Press Street to take that on track, goes very slowly around the curve to Franklin Avenue.

Q. Now, Mr. Miester, you say now you live at 3524 Gentilly Road?

A. Yes, sir.

Q. What cars do you use now for transportation?

A. I use the Gentilly car.

Q. You don't use the Gentilly bus?

A. No, sir.

Q. You have no automobile?

A. I have.

Q. How often do you use the car?

A. Very seldom. My family uses the car a good deal.

Q. Now, you lived at 2340 Franklin Avenue the past four years?

A. Not the past four years.

Q. With the exception of the last four months?

A. No, sir, I didn't say that. I lived there four years, not the past four years. I lived there from 1918 to 1922, I think it was.

Q. And you have been out in that section, as you say, frequently?

A. Continuously since that time.

Q. And never seen any accidents on the viaduct?

A. I have not.

Q. Or any cars meeting on the viaduct?

A. Yes, I have.

Q. I thought you said you did not?

A. I said I didn't see any accidents. You asked me if I saw any accidents. I have seen cars a number of times on the viaduct going in opposite directions.

[fol. 107] Q. You would have been in a position to see accidents if there had been any?

A. Yes, sir, if they happened while I was there.

Q. Where did you live from 1922 to the present time?

A. Mandeville, near Villere, and St. Claude, near St. Roch.

Q. In the last four months on Gentilly Road?

A. Yes, sir.

Redirect examination.

Mr. Conkerton:

Q. The times you have used the street car service, what observation have you made as to prompt service?

A. I haven't paid very particular attention to whether it was what it should be. Always found in the day time, when I used it, I waited quite a bit for the cars. That's about all I noticed. Sometimes in the day, especially in the afternoon, when I did use it, I waited at the switch signal for one car to get from one side to allow the car I was in to go over.

Recross-examination.

Mr. Kammer:

Q. What is your business now?

A. General insurance.

Q. Have you anything to do with the real estate business?

A. Except in my line, and in appraising property for a homestead with which I am connected.

Q. Have you anything to do with the purchase and sale of real estate?

A. No, sir.

Q. If you don't use these Villere cars but very infrequently, what is your interest in this case?

[fol. 108] A. It started—You want me to tell you exactly?

Q. Yes.

A. It started this way. I lived at Franklin Avenue and Dorgenois. When I first married I always had an ambition to live on Franklin Avenue, because I believed it was

destined to become the best street downtown. I purchased some lots in the vicinity of the viaduct and became connected with the Franklin Avenue Association. I always looked upon the viaduct as a temporary structure, and thought it would be moved and I knew from other evidence introduced that it was dangerous to a certain degree, and I thought a grade crossing, like at St. Louis and Claiborne, would be a big advantage to the community and remove what we considered a danger as far as the viaduct was concerned. It would better the street car service, and eliminate the discrimination between grade traffic and automobiles. You can't see a train on account of the concrete pillars. And I became interested in the case from the standpoint of civic pride and betterment of the conditions in the community I have always lived in.

Q. And not with reference to your lots?

A. Naturally, I bought the lots on the side of the viaduct with the intention to build, and my interest was not directly personal with reference to the purchase of the lots. I knew the viaduct was there. My work has been one of civic pride, and to cooperate with the Gentilly and Edgewood and Franklin Avenue Improvement Associations, which have all petitioned that the viaduct be removed.

Q. You bought these lots very cheaply?

[fols. 109 & 110] A. I don't think very cheap. I think I paid what the man wanted. He held them a number of years. They are between Dorgenois and Law.

Q. On the side of the viaduct?

A. Yes, sir. I might add that I could not wait for this thing. That's why I bought the house on Gentilly Boulevard. It seemed like that section is destined to be held back. That is my opinion.

[fol. 111] Testimony and Note of Evidence Taken January, 9, 1929, on Behalf of the Defendant, on the Merits, in Open Court, Before Honorable E. K. Skinner, Judge, Presiding

[fol. 112] William Niehues, Jr., a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Kammer:

Q. Mr. Niehues, by whom are you employed?

A. Southern Railway System.

Q. Where is your office or the place where you work located?

A. Press and Galvez Streets.

Q. How far is that from the crossing of the Southern Railway tracks over Franklin Avenue?

A. That office is about thirteen blocks.

Q. Does your work carry and take you in the vicinity of the Franklin Avenue crossing?

A. Within about three blocks from there.

Q. What do you do there?

A. Check the register. There is a register switch engine foremen have to register, and I go to it and check the register, and do some other work in another office.

Q. Have you had occasion to observe the through freight trains and through passenger trains coming into and going out from the City as they cross Franklin Avenue?

A. Yes, sir.

Q. Do you know whether or not those through trains stop at Franklin Avenue?

A. I have never known one to stop there.

Q. You have never known one to stop there?

A. No, sir.

Q. You are out there in that section daily?

A. Almost daily.

[fol. 113] Q. I show you a letter, dated October 27, 1927, written by and signed by J. E. Fitzwilson, Vice President, New Orleans Terminal Company, to E. S. Meyers, Assistant to Vice President, New Orleans Public Service, giving the number of cars and engines and trains crossing Franklin Avenue from September 1, 1926, to September 30, 1927, and ask you if the information given in that letter is correct?

A. It is all correct with the exception of one figure here. That should be 128,168 instead of 125,168. Nevertheless the total is the same.

Q. That figure 125,168, which you say should be 128,168, is the number of cars in through freight service?

A. Yes, sir.

Q. With that exception, the figures given in the letter are correct?

A. Yes, sir.

Q. Now, I show you a letter, dated December 8, 1928, from J. E. Fitzwilson, Vice President, New Orleans Terminal Company, addressed to E. S. Meyers, Assistant to Vice President, giving the same information as to the number of cars, engines and trains in passenger service, through freight service and side track freights, from October 1, 1927, to and including September 30, 1928, and ask you if the figures in that letter are correct?

A. Yes, sir.

Q. The figures shown in these letters were made up by you yourself?

A. Yes, sir.

Mr. Kammer: In connection with the witness' testimony, [fol. 114] I offer the two letters in evidence, marking the one dated October 27, 1927, D-1, and the one, dated December 8, 1928, D-2.

Q. What are those particular yards at Franklin Avenue used for?

A. Storing cars mostly, I should say.

Q. Are they used for switching?

A. Why, there is some switching done there, yes, sir.

Q. And isn't that the interchange between the Louisville & Nashville Railroad and the Southern Railway?

A. Cuts of cars coming to and from the L. & N. interchange in those side tracks. It is not the interchange. It is the interchange over at the L. & N. crossing, the L. & N. interchange. That is not the L. & N. interchange, those yards.

Cross-examination.

Mr. Conkerton:

Q. These figures you give here represent every twenty-four hours? For example, you say, the period from September 26 to September 30, 1927, per day, you mean each twenty-four hours?

A. Yes, sir.

Q. How many hours time per day do you work?

A. Eight.

Q. Then you did not personally check each and every one of the trains and cars that passed?

A. No, sir.

Q. When you say that it is correct, you necessarily take somebody else's figures?

A. Well, the records we go by.

Q. In other words, you only check for eight hours and [fol. 115] can only tell what passed in eight hours?

A. No, sir. That is the check for twenty-four hours.

Q. You checked for eight hours yourself?

A. I only work eight hours a day. I don't check any of that myself. All that is checked from records some one else has made.

Q. How do you know they are correct, if you did not check them yourself?

A. The records we go by are correct.

Q. Are you testifying to something of your own personal knowledge?

A. The figures I made there are correct. They are made from records some one else made. That's the records we go by.

Q. What you are testifying from is from what somebody else made and not figures that you made?

A. From figures some one else made.

Q. You are unable to say from your personal knowledge whether this is correct or not?

A. It is correct from what we have to go by.

Q. Are you able to say from your personal knowledge, what your own observation is, that they are correct,—not from what somebody else told you or records somebody else made?

A. I don't know how to answer that question. Those figures are made from records we have.

Q. Without taking anybody else's figures or records——

A. I could not make that report, because I don't check it myself.

Q. Then how can you say they are correct, if you did not make the check yourself?

A. The records we have are supposed to be correct.

Q. Everything you have testified to is from records made [fol. 116] by somebody else and not made by yourself?

A. That is all we can make them from.

Q. You have—There is a single track at present that enters into the Florida Walk yards, isn't there?

A. A single track, yes, sir. I wouldn't say a single track leading to the Florida Walk yard. That one single track you are referring to there, I think, connects with two main lines.

Q. It is a single track?

A. Yes, sir.

Q. And the closest you have gotten to Franklin Avenue is three blocks?

A. No, sir.

Q. Didn't you testify to that on direct examination?

A. I said I worked three blocks from there, but I do go by the viaduct at times.

Q. Before coming into that single track do trains have to stop or slow down?

A. Southbound trains don't. Northbound trains stop before they can enter that single track, but that switch, that single track is this side of the viaduct. Those trains may go over Franklin Avenue under control, but don't stop for Franklin Avenue.

Q. Didn't you say that northbound trains do stop?

A. Stop for that switch before they enter the single track you are talking about, but they don't stop before they hit Franklin Avenue.

Q. They have to stop before coming into that single track which is about two blocks from Franklin Avenue?

A. About that I should say.

Q. And southbound trains, you say, do not stop?

[fol. 117] A. Do not stop.

Q. They pass Franklin Avenue under control?

A. Not southbound trains, I don't think.

Q. Do they stop or slow up for the L. & N. crossing at Elysian Fields Street?

A. I don't go that far up, Elysian Fields Street. There is one crossing up there that they come to a dead stop. I don't know whether it is Elysian Fields Street or Pontchartrain crossing.

Q. Isn't Elysian Fields Street and Pontchartrain crossing one and the same?

A. No, sir.

Redirect examination.

Mr. Kammer:

Q. During the course of two years how many men would you say actually worked on checking these cars in the yards?

A. How many men made reports?

Q. How many men would work on this check in the past two years?

A. I have no idea.

Q. May have been twenty or twenty-five or maybe fifty in two years that worked on this character of work?

A. That made those figures or that made the records I made the figures from?

Q. That made the records you made the figures from?

A. I might say maybe a thousand.

Q. And you made the records from the figures that were turned in by these men who made the actual check, and those are the official records of the Company?

A. Yes, sir.

(Recess.)

[fol. 118] After Recess

L. J. Darrah, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Kammer.

Q. Mr. Darrah, did you have occasion, in September and October, 1927, to make a check of the trains crossing Franklin Avenue, that is trains of the Southern Railway Company, crossing Franklin Avenue at its crossing?

A. Yes, sir.

Q. In making that check did you check every train that crossed Franklin Avenue, whether it was a passenger train, freight train or a switch train?

A. Yes, sir.

Q. In other words, every train or every locomotive that crossed under the viaduct?

A. Even down to a hand car.

Q. I show you a statement of a check showing the delays to traffic across Florida Walk, from six o'clock in the morning to twelve o'clock midnight, on September 29-30, 1927, and October 1, 3, 4 and 5, 1927. You weren't there continuously from six in the morning until twelve o'clock midnight?

A. No, sir.

Q. You were there part of the time?

A. Yes, sir.

Q. And did you have supervision of the other men who were making the check?

A. Yes, sir.

Q. And this recapitulation I have in my hand was made [fol. 119] by you from your own check and that made by the men under you?

A. Yes, sir.

Q. I show you recapitulation, marked D-3, and ask you to look at that and say if that is the recapitutation you made up, and if you can certify to its correctness?

A. Yes, sir.

Q. Now, this statement showing the number of delays that would have taken place, or rather, I should say, it shows the number of trains crossing Franklin Avenue each day of the days shown on the recapitulation, and when you say the time delayed by each one of those trains, how did you estimate that particular delay?

A. Well, we set off a sign approximately a hunderd yards from the center of the street car track, underneath the viaduct, and the minute a train hit that sign,—we placed that arbitrary sign there,—we took his time to the second, and the second the train cleared the track, the street car track, we took his time again, and substracting that previous time from that time gave us the difference, which we called the time delayed.

Mr. Conkerton: Objected to as irrelevant and immaterial. I don't see what the delay of trains crossing Franklin Avenue has to do with this case.

The Court: I think the Supreme Court is entitled to the whole record. I will let the objection go to the effect.

Mr. Conkerton: The same objection is made to all testimony of similar character, without the necessity of repetition.

The Court: With the same ruling.

[fol. 120] Mr. Kammer:

Q. You have observed trains crossing street car tracks at points where there are traffic gates?

A. Yes, sir.

Q. Would you say that the delay caused by trains crossing street car tracks where there are gates would be greater or lesser than the delay you have taken here, which is from where a train reaches a point a hundred yards from the crossing until such time as it clear the crossing?

A. I figure it would be twice as long,—the gates would,—at least that much.

Q What would that be due to?

A. Speed of the trains, for one thing, and the danger of cars coming across there. They would have to stop ordinarily within reason, to give enough safety to the cars across there. They should cut them down at least twice as long as we took the check, to give time to people to get out of the way.

Q. In other words, where gates would be lowered, when the train was at a point further removed than the point you took the time, and after the train had passed the gates would have to be raised before the traffic could proceed?

A. Yes, sir.

Q. I show you another recapitulation, marked D-4, which was a check of the time of delays on December 5, 6, 7, 1928, from six in the morning until twelve o'clock midnight, and ask you if that check was made in the same manner by you and the men under your direction?

A. Yes, sir.

[fol. 121] Q. And you made up that recapitulation?

A. Just like I did the other.

Q. And that is a correct statement of the delay?

A. Yes, sir.

Q. Your testimony with regard to the length of delay being increased or being greater where gates would be used, would be the same with regard to this statement?

A. Yes, sir.

Mr. Kammer: In connection with the witness' testimony, I offer the two statements in evidence, marked D-3 and D-4.

Q. Now, Mr. Darrah, you were out there at the Southern Railway crossing at different hours during the day and night in making this check?

A. Yes, sir.

Q. Did you see at any time while you were out there any men lying around the viaduct or up on the viaduct itself?

A. The only man I ever saw there was the special agent of the railroad company, the detective out there watching the yards.

Q. You mean the special agent of the steam railroad company?

A. The steam railroad.

Q. There is also at that point, I believe, a signal tower or station where the flagman stays, isn't there?

A. At the viaduct? No, sir.

Q. Isn't there?

A. A flagman, now, yes, sir. It is not a tower. He is down below, under the viaduct.

Q. There is a flagman there at all times, day and night?

A. Yes, sir.

[fol. 122] Q. That place where he stays is nearby to where the steps go up the viaduct?

A. Yes, sir, right around that post, that concrete column there.

Cross-examination.

Mr. Conkerton:

Q. Of course, these statements are made by you upon supposition only?

A. What statements do you refer to?

Q. Those particular statements of delay?

A. No, they were taken on actual check.

Q. Did you check the street cars waiting on the side to cross the viaduct, and see if the delay there was any greater or any less than that whch you checked here?

A. That is trains there. We didn't have anything to do with street cars.

Q. That is on the supposition it was a grade crossing?

A. That statement shows how many times, or the number of times, that the viaduct,—there was a hypothetical line drawn beneath the viaduct itself,—was crossed by trains.

Q. Did you check the street cars?

A. No, not at all.

Q. You don't know if the delay at present is greater or less than if there was a grade crossing to-day?

A. I have no way of knowing that.

HENRY MCCABE, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

[fol. 123] Direct examination.

Mr. Kammer:

Q. I show you a statement which I mark D-7, and ask you if you made up that statement, and what it shows?

A. Yes, sir, I made up that statement. It shows the number of passengers carried for eighty-eight days, and also the average per car, which is forty-six, carried on the Gentilly line.

Q. This statement shows the total number of passengers carried on the entire Gentilly line, going from Canal Street to its terminus, at Drew Avenue, and Drew Avenue back to Canal Street again, for a period of 88 days, from October 1, 1928, to December 27, 1928?

A. Yes, sir.

Mr. Kammer: In connection with the witness' testimony I offer the statement in evidence, marking it D-7.

Q. Now, I show you a statement, marked D-5, and ask you if you made that statement and if it is correct and what it shows?

A. Yes, sir. It shows the total passengers carried by the year, starting with the year 1922 and for through 1928. It shows the total number of passengers carried by the Gentilly line.

Q. For each year?

A. For each year, yes, sir.

Q. And those totals are the totals of the passengers carried both way?

A. Both directions.
Q. From Canal Street to Gentilly and——
A. From Canal Street to Drew Avenue and back to Canal.

Mr. Kammer: In connection with the witness' testimony [fol. 124] I offer in evidence the statement D-5.

Q. Now, I show you a statement, marked D-6, and ask you if you made up that statement, and what it shows?
A. Yes, sir. It shows the earnings of the Gentilly line by years, from the year 1919 through 1928.
Q. Now, that shows the amount of cash fares collected on the line?
A. Yes, sir, the revenue, the gross revenue.

Mr. Kammer: I offer the statement marked D-6 in evidence.

Q. Now, I show you a statement, marked D-8, which is marked "Gentilly Line," showing the passenger load at Almonaster and Franklin Avenue, taken December 31, 1928, and ask you if that statement was made by you?
A. The statement was made up by me and shows check of the cars taken, going in both directions, six o'clock in the morning until 9 o'clock, and from four to seven, which is considered the peak. It shows the number of cars that passes each period and the number of passengers in the period, and the average passengers per car, taken going in both directions.
Q. That check was made of the actual number of passengers in the car at what point?
A. Almonaster and Franklin Avenue, where they meet. They branch off at Roman Street, practically at Roman Street.
Q. And that is near the Franklin Avenue viaduct?
A. In the vicinity of the viaduct.
Q. And you say that taking the passengers in the cars at the corner of Almonaster and Franklin Avenue, would be a fair representation of the number of passengers that are in the cars as they cross the viaduct?
[fol. 125] A. It would be a fair estimation. Of course, some will board and some alight.
Q. Some will board and some alight between Almonaster Street and the viaduct?

A. Yes, sir. Some would board and some would alight between these two points.

Q. So this statement does not necessarily mean that every one of the passengers in this car crossed the viaduct?

A. No, sir.

Q. But that was the point where the cars stop and you took that point as a reasonable point to make the check?

A. Yes, sir.

Mr. Kammer: In connection with the witness' testimony, I offer the statement, marked D-8.

Q. What position have you now with the defendant?

A. Chief Clerk, schedule department.

Q. Prior to that time what was your position?

A. I was supervisor, barn foreman and motorman.

Q. As supervisor, on what line or lines were you?

A. I was on the—I had the night job of the entire division, after twelve o'clock at night,—I mean to say, from eight to six in the morning.

Q. As supervisor, did your job carry you in the neighborhood of the Gentilly line?

A. Yes, sir.

Q. And likewise in the neighborhood of the Franklin Avenue viaduct?

A. Yes, sir.

Q. How often were you or would you be in the neighborhood of the viaduct?

[fol. 126] A. Well, anyhow at least three or four times a week, on that particular line.

Q. Did you ever see any accidents on the viaduct?

A. The only one accident that I can remember was a horse killed on the viaduct.

Q. Was that horse killed on the viaduct or the embankment?

A. On the embankment, I mean to say,—passed where the mud or rocks was, slipped in between the ties and was killed by a car on the Gentilly side of the viaduct.

Q. How long ago was that?

A. About 1916.

Q. Did the car jump the track?

A. Front trucks of the car left the rail.

Q. And what kept the car on the viaduct?

A. Guard rail kept the car on the viaduct.

Cross-examination.

Mr. Conkerton:

Q. In just what manner was the information for these different statements taken? Taken by actual count or from the cash fares?

A. Which statement is that you have reference to?

Q. Any of the statements?

A. Earnings were taken from the records.

Q. This statement here was taken from what, the cash fares?

A. Revenue from cash fares. That was made up from the official records of the company.

Q. And this statement, D-5, was taken from what?

A. That's the total passengers carried. Total passengers means cash, transfers and all others.

Q. Where was the statement derived from? The regis-
[fol. 127] ters they keep in the car, or the conductors' returns, or what?

A. It has to balance with the other. Conductors' returns has to check up with the registers.

Q. Where were the figures taken?

A. From the official records of the Company.

Q. They weren't from personal checks made by you?

A. No, sir, not those figures.

Q. In other words, the statement is made up from the returns by conductors?

A. From the records of the company.

Q. And you have no personal knowledge of it yourself?

A. The knowledge I have is taken from the records.

Q. You can't say whether there was a greater or less number of passengers carried, from your personal knowledge?

A. They have to balance. One has to balance the other. The conductor's trip sheet has to balance with the register taken by the Company. That's two different sources.

Q. Suppose the conductor didn't ring up any fares, would the cars have carried more than this check?

A. I would have to ride each individual car.

Q. Did you do that?

A. No, it is impossible for a man to be on 16 or 17 cars at the same time.

Q. You don't know anything about it from your personal knowledge?

A. As I said before, I took those figures from the official records of the Company.

Q. And those records were not made by you?

A. No. It is impossible for me to make all the records. Those records come from five different stations.

[fol. 128] Q. Now, you don't know from the period when the viaduct was originally constructed what was the traffic over the viaduct?

A. I know now it is more traffic over the viaduct than when it was originally constructed.

Q. There has been a material increase?

A. There has been an increase, naturally.

Q. That section served by the Gentilly line, as it is known today, is more thickly populated than in 1909 or 1910?

A. Yes, sir.

Q. Now, all these cars you checked at Franklin Avenue and Lafayette or Almonaster Street?

A. I said that I gave orders for that check and supervised it. It was made by the official checker, made by the official checker of the Company.

Q. You couldn't say whether or not this check is correct or not?

A. The official checker of the Company.

Q. But you yourself personally, you don't know whether it is correct or not?

A. As I don't check each individual car, no.

Q. You are testifying from a statement made by somebody working under you?

A. That check was made by my orders.

Q. You say the only accident you know of was a horse killed, and that was in 1916?

A. That is the only accident I am positive of, because I was there. I went there when the car was derailed, with the wrecker.

Q. That was in 1916?

A. Approximately.

Q. You are sure of that?

A. I said, about.

Q. If I were to tell you it was in 1927?

[fol. 129] A. I could tell you, no. I am sure it was not 1927.

Q. How long have you been supervisor connected with the Gentilly line?

A. I said I was night supervisor, with supervision of the system, from 1912 to 1920. I didn't say the Gentilly line particularly. That was one of them.

Q. Do you know a motorman named Donnelly on the street car on the Gentilly line?

A. He is out of the Poland Barn. They are allowed to pick any line they want. He did work out of the Poland Barn.

Q. You don't know whether he was in an accident out there or not?

A. I haven't been supervisor since 1920.

Q. You don't know whether or not there was any accidents out there since 1920 or not?

A. You said you wanted information that I was positive of. If I say I heard of accidents,—I can say I heard of accidents——

The Court: Never mind. Just tell what you know yourself.

Mr. Conkerton:

Q. You don't know anything since 1920?

A. Since 1920 I have been in the office.

Q. Everything you know of is prior to 1920?

A. Prior to 1920.

Q. And you don't know whether all these cars you checked at Franklin Avenue and Almonaster Street went over the viaduct or not?

A. If they did switch, we got switching reports, and on that day we haven't any switching reports that they switched at that particular time we were checking,—so [fol. 130] evidently they went over the viaduct.

Redirect examination.

Mr. Kammer:

Q. With regard to the number of passengers in these cars, there is a record taken or check made of what the register shows each day on every car?

A. Yes, sir.

Q. And there is also turned in by the conductor what is called trip sheets which show the number of passengers he has carried?

A. Yes, sir.

Q. And those two balance? One checks against the other?

A. Yes, sir.

Q. And the records you compiled are made in that office where you are in from those original meter or register checks and from the original trip sheets of the conductor?

A. Yes, sir.

Q. And you are familiar with those records?

A. Yes, sir.

W. F. Loan, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Kammer:

Q. In what department of the New Orleans Public Service are you employed?

A. Claim Department.

Q. When an accident happens any where on the system, what happens?

A. Crew makes out accident report and sends it to the Claim Department,—usually comes in the following morning.

[fol. 131] Q. These reports are made of every accident that takes place?

A. Every accident that takes place, yes, sir.

Q. Did you search the records of the Claim Department with regard to accidents on the Gentilly line, with particular reference to the Franklin Avenue viaduct.

A. I did.

Q. How far back did you go in making that search?

A. As far back as 1920.

Q. Why didn't you go further back?

A. Because due to a fire in the old building, Common and Baronne Streets, around 1923 or 1924, all our records prior to 1920 were destroyed.

Q. Now, from 1920 to 1928, will you tell us just what accidents took place on the viaduct, in so far as the records of the Company show?

A. You want me to read them?

Q. Just state the date and the accident.

A. March 25, 1922, some unknown reason, glass in left front vestibule was broken while car was on top of the viaduct. Wind was blowing hard at the time.

The Court: Isn't there some way of shortening this, gentlemen?

Note: The court examines the documents handed up by witness.

The Court: I think you can take that statement.

Mr. Kammer: That statement shows accidents not only on the viaduct but on the line, and one made up afterwards for me, on the viaduct itself, show only that many. (Exhibiting statement)

Q. I show you the one you just had. I show you statement of accidents occurring on or in the vicinity of the Villere viaduct from January 1, 1920, to December 16, [fol. 132] 1928, inclusive, and ask you if you made up that statement for me?

A. I did.

Q. Now, I show you another statement marked "Accidents occurring on or in the vicinity of the Villere viaduct, from January 1, 1920, to December 16, 1928, inclusive," and ask you if you made up that statement for me?

A. Yes, I made that statement.

Q. The large statement, which I will mark Loan 1, shows every accident of any kind or character that the Company has record of, occurring on or near the viaduct during that period of time?

A. Yes, sir.

Q. Now, in checking this back, I understand from you one was left out and you now wish to add that one to it?

A. Yes, sir.

Q. I will mark that, to keep it with it, Loan 1-A. Now, the other statement, which I mark Loan 2, as I understand it, is a duplicate of the statement marked Loan 1, of those

accidents that actually happened on the viaduct due to the operation of the cars?

A. Yes, sir.

Mr. Kammer: In connection with the witness' testimony I offer the three statements in evidence, Loan 1, Loan 1-A, and Loan 2.

Cross-examination.

Mr. Conkerton:

[fol. 133] Q. On this document Loan 1-A, is that the accident you heard referred to as being a horse on the viaduct? What was the date of that accident?

A. This accident was November 5, 1926, as shown by our records.

Q. It was not in 1916.

A. We have no records for 1916.

Q. You have no records that, that is no record of accidents that may have happened where no claim was made on the Company?

A. Only what you see in that folder. Now, I learned that an accident occurred in October, 1927. So I rechecked my records of 1925, 1926, 1927 and 1928, and found no accident to a horse in 1927.

Q. You have no record of anything prior to 1920?

A. No, sir, I have not.

Q. Under date May 1, 1921, shows boy was killed on the viaduct in some manner. What was the nature of that accident?

A. This boy was climbing the trestle work, trying to get a bird's nest, and I understand lost his balance and fell and struck a wire and fell to the ground and was killed. I think it was the fall to the ground that killed him and not the wire.

Q. What does the report say, "killed by fall to the ground?"

A. No.

Q. Doesn't it say that he was electrocuted?

A. I would have to get that report to see whether he was electrocuted. I might be mistaken in that.

Q. I read to you, under that accident, file No. 106943, dated, 5-1-21, 2 p.m., name, Albert Oberling, white, descrip-

tion of accident: Boy, 9 years of age, while climbing on trestle under viaduct, trying to locate bird's nest, fell on to some electric wires of the Sewerage and Water Board [fol. 134] and was electrocuted." That's correct, from your report?

A. Yes, sir, correct.

Q. You are quite sure you never missed any accident where claim was made on the Company?

A. That is how I got that other report. When I learned I was going to testify, I made an individual check of my records and found that report that had not been recorded, and I immediately made a notation of it and turned it over to Mr. Kammer.

Redirect examination.

Mr. Kammer:

Q. Mr. Conkerton asked you if this record was a record only of claims made on the Company. Does that record show claims only, or all accidents whether a claim is made or not?

A. Shows all accidents. We never referred to our claim book at all, just the accident book.

Q. From the accident book itself?

A. Yes, sir.

Recross-examination.

Mr. Conkerton:

Q. Suppose the conductor or crew in charge of the car neglected or otherwise failed to report an accident, would that have shown it?

A. I can't see where it would show. That's something we wouldn't know anything about.

Mr. Kammer: That is entirely obvious.

The Court: I think so. If the conductor did not report it, he disobeyed orders.

[fol. 135] Paul C. W. Jensen, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Kammer:

Q. You are supervisor for the Company?
A. Yes, sir.
Q. In what part of the system?
A. Poland Division.
Q. That comprises what runs?
A. St. Claude, North Claiborne, Desire and Gentilly.
Q. As supervisor in that division, how often does the work take you in the vicinity of the Franklin Avenue viaduct?
A. Daily for the last year or more.
Q. How long have you been with the Company?
A. I have been with the Company since the 15th of December, 1924.
Q. Will you explain how the red light signals are worked near or at the Franklin Avenue viaduct?
A. Yes, sir. They are operated by the trolleys of the street cars. In other words, you have a contact placed on the trolley wire, and when the trolley wheel strikes this contacter, it automatically works the electric magnet in the block signal, and it will show a white light and a red light on the other end of the block.
Q. And if the trolley wheel reaches that point of contact, and the signal shows white, the car starts over the viaduct?
A. Yes, sir.
Q. And as that signal shows white, automatically it shows red at the other end?
A. At the other end.
Q. What does the car do that is approaching from the other end?
A. Stops until the car in the block comes out of the block.
[fol. 136] Q. Now, does that signal change, or is that signal so placed, the red light and the white light, so that the change is made before the car reaches the end of the viaduct approach or after?
A. Well, the contact is placed different at both ends of the viaduct. On the Gentilly side you have two contacters, one on the outbound track, where the car checks out of the block, as it passes the contacter, and another contacter on

the side between Abundance Street and Treasure Street, where the inbound car checks in after the other car comes out of the block. But at Dorgenois Street, there is only one contact, placed between Dorgenois and Rocheblave Streets. In other words, between Dorgenois Street and the switch that you approach to go into the double track after leaving the viaduct.

Q. How far from the end of the viaduct is that signal?

A. On which end?

Q. Take the river end?

A. Dorgenois Street? From the extreme end of the viaduct to the contacter, I judge about ninety feet.

Q. Now, what would you say would be the distance on the other end nearest to the approach?

A. From Abundance Street, about seventy feet, I judge, —seventy or eighty,—I am not quite sure of the measurements.

Q. Now, when a car runs up to that signal does it ever happen that it has to back down?

A. Yes, sir. Once in a great while, due to a defective trolley wheel, the signal may not check in, and the motorman has orders to back up and hit the contacter again. In [fol. 137] other words, they are not permitted on any condition to proceed over the viaduct on no light whatever. Must have clear light shown before they must proceed over.

Q. And when he comes to a stop before backing up, he has not yet reached the end of the viaduct?

A. No, sir. He is right over the switch.

Q. Has not reached the end of the fill even?

A. No.

Q. During the time you have been out there at night, have you ever noticed any men loitering around the viaduct or on top of it?

A. No, sir, I can't say that I have. In the day time there is always a few men around the bottom of the viaduct, that is, right at the Southern crossing,—the flagman there, and the special agents for the Southern Railroad, and switchmen and a few laborers maybe, section gangs, but I have never noticed any one loitering around there.

Q. Have you ever gone up and down the steps, the approach to the top of the viaduct?

A. I have, on very few occasions though, one or two occasions maybe.

Q. Did you ever notice anybody loitering on the steps?

A. No, sir, I can't say I have.

Q. Do I understand that this signal is on the river side of Dorgenois Street, that is, between Dorgenois Street and the street towards the river?

A. Yes, sir.

Q. And the approach of the viaduct, the fill, starts on the other side of Dorgenois Street?

A. Yes, sir.

Q. And I understand that these cars, when the contact [fol. 138] does not take place, they stop even before they get to the signal?

A. Oh, yes, before they get to the signal itself, or right abreast of it. You see, at times a man may be coming down, say, two or three minutes late, and he don't make the stop at Rocheblave. Naturally he is going along at a pretty fair clip or speed, running to get that light,—throws off the power as he passes over the switch, and as he is about to get the light, the fellow on the other end flashes it in his face. There is nothing left for him to do, but the conductor gets out and lines up the switch and backs up, because that car is coming over and has the right of way.

Cross-examination.

Mr. Conkerton:

Q. There is danger of two cars approaching?

A. Danger? I don't see where there is any danger, because one is one side of the viaduct and the other on the other side.

Q. Suppose on the respective sides of the viaduct, both cars struck the signal simultaneously, what would happen?

A. You wouldn't have no signal at all, and the men have orders not to proceed over the viaduct on no signal whatever. Their instructions are that if the signal don't show up, to back up, try with the same trolley again, and if it don't work, use the other trolley, which may be caused by a defective trolley wheel. And if the second trolley don't give the light, then as a further safeguard, the conductor

has instructions to go out in the street and see if the other car is coming over. That's the instructions the men have [fol. 139] as far as safeguarding any head-on collisions on the viaduct.

Q. If they follow those instructions—Do you know if they follow those instructions?

A. I know they do. I am positive. Sure, I am positive.

Q. Why are you positive?

A. Because I see it from time to time that they are carried out.

Q. Are you there twenty-four hours of the day?

A. I am on the line from 6 to 11 in the morning and from 1 to 7 p. m., with the exception of Wednesday, my day off, and another man takes my place.

Q. It could occur when you are not there and you know nothing about it?

A. Well, there are others looking after the line then.

Q. And it has happened, due to a defective trolley, the signal has failed to work.

Q. Well, I couldn't say for sure whether it has happened, because when ofttimes, you know, you may hit the contact a little too fast or too slow, as you readily understand,—anything automatically operated mechanically is bound to fail from time to time,—but when you try the second time, it will show up. Hence the orders they have to back up and try again before proceeding over.

Q. You don't know whether those orders are carried out when you are not there?

A. I am satisfied they are carried out, because as long as I have been on the line, I have never had a car meet head-on on the viaduct, nor have I ever had an accident, and I have been in charge of the line since September 1, 1927.

Q. Have cars ever been compelled to back up?

[fol. 140] A. At Dorgenois Street, for missing the light, but not meeting on top of the viaduct.

Q. If somebody has testified that cars have met on the incline or viaduct and backed up, they are not telling the truth?

A. They meet, like I stated, at Dorgenois Street, missing the light, you understand. And on one occasion, to my knowledge, that I heard of, was when the trolley wire was

changed on the spur track. The foreman that done the job——

Q. Don't testify unless you know it yourself. That is what I am trying to get at when I asked you if you can testify from your own personal knowledge whether those instructions are carried out, and you say you are not there at all times?

A. Of course not at the viaduct at all times.

Q. Therefore, you are unable to say whether or not those instructions are carried out as given?

A. Well, of course, technically not, no.

Q. How many times have those signal lights or signals been changed?

Q. How many times have they been changed? I don't keep records of that. I know they are overhauled periodically, and inspected almost every week, that is, the contacts.

Q. You don't know how many times they have been changed?

A. No, sir, I don't.

Q. You testified about the flagman at the Southern Railway crossing. Do you know how long he stays there?

A. I understand——

Q. Don't say what you understand.

A. I don't know his hours.

[fol. 141] The Court: Don't give us what anybody told you.

Mr. Conkerton:

Q. And if tramps or other undesirables loiter in the neighborhood after you left, you wouldn't know anything about it?

A. No, sir.

Q. You aren't out there at all times?

A. No, sir, not at all times, but I am on the line.

Q. You seldom, if ever, use the stairway up to the top of the viaduct?

A. I pass over the viaduct, but don't get off,—very seldom, unless maybe the track foreman is doing some work up there and I may step off.

Q. You seldom go up or down the steps?

A. No, sir.

Q. And what condition exists below or under or about those steps, you don't know?

A. No, sir, I do not.

Redirect examination.

Mr. Kammer:

Q. It is part of jour job to see that the orders are carried out by the men with regard to operation of the cars over these signals, isn't it?

A. Yes, sir.

Q. Now, some testimony has been given here that at 7 and 7:30 a. m. cars going towards the city would become congested at the lake end of the viaduct. Have you observed ed any cars piling up there?

A. No, sir, not when the line is on schedule time. But we have had numerous delays between Gentilly Road and [fol. 142] Drew Avenue, due to paving contractors working back there, and naturally the cars would come in and bunch up, and of course if an outbound car is going over the viaduct, naturally those two or three cars would have to wait until he came off the block signal.

Q. Those delays were caused by paving contractors in what way?

A. Paving contractors unloading material or digging.

Q. By blocking the track?

A. Yes, sir.

Q. Uuloading paving material and things of that sort?

A. Yes, sir.

Q. And those cars would then pile up on the lake side of where that took place, and after the track was cleared, approach to the end of the viaduct, and that is the place where they would have to wait until the car came over, off the block signal?

A. Off the block signal. However, from where I am at in the morning, I can see the cars when they hit the first block signal at Bay Street. Also see them coming over the L. & N. and if a car is coming in late, I hold the outbound car at Rocheblave Street to give the inbound car the right of way, as he is carrying the load towards Canal Street.

Q. There has also been testimony that between 6 and 7 at night, there are anywhere from three to five cars waiting on one end of the viaduct to let others come off?

A. I wouldn't say that many. Maybe two, at times three. We have peak trippers that come in the barn and they double-head over the viaduct with the regular car. Like, for instance, the regular car leaves the end of the line 6 p. m. Another regular run that runs in leaves 6 p. m., and the [fol. 143] next peak tripper at 6 p. m. follows the regular car over the viaduct. This would account for three cars coming over at the same time.

Q. After the peak hour is over and you get ready to take those cars off the line, they are empty cars going in the barn, and you follow those behind the regular car?

A. Yes, sir.

Q. And when they reach the end of the viaduct, if another car is going over, there would be three cars waiting to go over, and they go over all at one time?

A. Yes, sir.

Q. And except for the fact these are empties going in the barn after the peak hour, there is only one car delayed?

A. Yes, sir.

Recross-examination.

Mr. Conkerton:

Q. Have you ever seen more than one car held up?

A. Yes, sir. Two or three, four at times. But not due to the viaduct, to some other delays occurring along the line over which we have no control.

Q. Is there any paving going on, on the river side of the viaduct?

A. Yes, sir. Dauphine Street, too, right now.

Q. Does that interfere? How far away is Dauphine Street from Dorgenois Street?

A. It is about eighteen blocks.

Q. Would that cause delay at Dorgenois Street?

A. Sure. Absolutely. If one car is delayed here six minutes and the other car following him, six or seven minutes, he is right behind him by the time the other fellow is turned loose, and naturally everybody tries to get [fol. 144] in the first car, and that delays the line more,

and by the time he hits the viaduct, they are maybe three or four in a bunch, especially on a three or four minute headway like in the evening.

Q. Isn't it a fact that a temporary track was laid on the side of the regular track on Dauphine Street?

A. After they got the temporary track in there, we saved a whole lot of delays.

Q. Isn't it a fact that the temporary track was in immediately after they started that paving work?

A. I don't quite get you.

Q. Wasn't the temporary track placed there at the start of the paving work, and the cars immediately started running over the temporary track?

A. When they start rebuilding the track, yes, sir—while rebuilding the old track.

Q. That is on Dauphine Street, on the up track?

A. No, the down trip. We had Royal Street last year—in 1927, rather.

Q. They start down Bourbon Street at Canal and connect with Dauphine Street at Bourbon?

A. At Pauger.

Q. Are there ever two or three cars delayed when there was no paving work?

A. Yes, sir. Stalled trucks and one thing and another. You know it was bad mud streets.

Q. Were there ever any stalled trucks on top of the viaduct?

A. Oh, no.

[fol. 145] Q. Could any trucks stall between Dorgenois Street and the L. & N. crossing?

A. Yes, sir, before they paved, but it never interfered with us.

Q. That wouldn't interfere with crossing the viaduct and wouldn't cause any delay in holding two or three cars?

A. No, sir, no delay in going over the viaduct, any trucks stalled in that vicinity.

CORNELIUS HOOLAHAN, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Kammer:

Q. Mr. Hoolahan, you were a passenger on a Gentilly Street car in November, 1926, at a time when the car hit a horse when it was going towards the lake, on the lake side of the Franklin Avenue viaduct?

A. Yes, sir.

Q. The point at which the car hit the horse, was that in a place where there was a mud embankment on the side of the track?

A. Yes, sir, facing towards the lake.

Q. Now, what happened to the passengers in that car?

A. All the passengers come to the front and got out the front, on the front platform, and stepped on to the mud bank, and walked down the bank all the way to the other car.

Q. You were given transfers?

A. We were given transfers and walked down to the other car.

Q. And walked down to the end of the mud approach to another car?

A. That was waiting down there.

[fol. 146] Q. Now, were there any ladies in the car who walked down with you?

A. There were ladies.

Q. Was the car that hit the horse, did it remain lighted, with the headlights showing?

A. It remained lit. All lights were lit.

Q. Was the car at the foot of the viaduct by the switch, was it lighted, with the headlight burning?

A. Yes, sir. All the lights were lit.

Q. And you and the part of ladies and the other people in the car safely walked down that mud embankment, or walked down the track?

A. Down the middle of the track.

Q. And it was a mud embankment all the way down?

A. Yes, sir.

Q. Was anybody hurt walking down that way?

A. Not that I know of.

Q. If anybody had been hurt, any of the ladies, you would have seen them?

A. No one complained, when they got in the car, that they were hurt.

Cross-examination.

Mr. Conkerton:

Q. Do you know what happened to the passengers in the car behind that one?

A. No, sir.

A. J. DARBY, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

[fol. 147] Direct examination.

Mr. Kammer:

Q. Where do you live?

A. 2734 Constitution Place.

Q. Is that near the Franklin Avenue viaduct?

A. Yes, sir. At the corner of Franklin Avenue and Constitution Place, near the center of the viaduct.

Q. You are employed by the New Orleans Public Service?

A. Yes, sir.

Q. Have you anything at all to do with the viaduct?

A. Nothing other than as an employee interested in the Company I see that the lights are burning, or if anything or a board that needs attending to, get it replaced. If there has been an accident I take care of that.

Q. You have charge of the lighting of the lights on the viaduct?

A. Yes, sir.

Q. Those are the lights at the top of the viaduct, where the steel structure crosses the tracks, where passengers would be let off to come down?

A. Yes, sir.

Q. There are lights there and also lights on the stairway going down?

A. At the bottom of the stariway and one on top.

Q. You have been turning those lights on in the evening and off in the morning?

A. In the summer time turn them on and off regularly, but in the winter time, when you have long periods of darkness, I leave home early in the morning and don't turn them off. They burn all day as well as night.

[fol. 148] Q. This gentleman, sitting in the jury box, I don't know his name, he said the other day that he had the keys to those lights. What is he doing with the keys?

A. It has been quite a little period since he had the key for the lights. Which gentleman was it?

Q. He had not testified, but he said from the stand that he had the keys.

A. He gets the key from my home. He happens to be my father-in-law. And if I was coming home late, would request he put the lights on, and when he passed there at regular intervals, he did have a key to turn the lights on and off as well as myself—a duplicate key for that purpose, in case I should be late he could turn them on.

Q. In order to turn the lights on, you have to go up the steps?

A. Yes, sir.

Q. You have to do that every morning and every evening?

A. Every evening, yes, sir.

Q. Do you ever notice anybody loitering around at the bottom of the steps, any negroes or men, at night?

A. There have been cases at night where they were loitering on the track. I haven't seen them on the steps or on the viaduct.

Q. When you speak of the track, what do you mean?

A. Southern Railroad tracks.

Q. There is a flagman over there at that little house?

A. At present, yes, sir. I may say that since they have established a flagman there you don't see that any more.

Q. It is not there at all?

[fol. 149] A. It is only recently they put the flagman there, since the street was paved.

Q. That is the Southern Railway flagman?

A. Yes, sir.

Q. Now, living out there, do you know anything about any accidents on the viaduct?

A. There was an accident where a horse was killed one night. Some one came to my house and told me of the accident, and I went up and cleared the accident.

Q. Were there any passengers being transferred from one car to another?

A. There were a few passengers in the car that struck the horse.

Q. They were transferred to a car where?

A. On the lake side of the viaduct.

Q. And do you know whether or not any of those passengers hurt themselves while walking from one car to the other?

A. No, sir.

Q. You have been living out there how long?

A. Five years.

Cross-examination.

Mr. Conkerton:

Q. In what capacity are you employed by the Railways Company?

A. Instructor.

Q. How long have you been employed by the Company?

A. With the exception of one year during the war, nineteen years—just about nineteen years.

Q. How long have you had charge of the lights on the viaduct?

A. Practically since I am out there.

Q. Mr. Buttone, sitting in the jury box, did have access [fol. 150] to the keys, and was requested by you at times to turn on the lights?

A. Had a duplicate key.

Q. And he did turn on the lights until sometime recently?

A. Yes, sir.

Q. Do you know——

A. Beg pardon. I turned on the lights if Mr. Buttone failed to do so. He had a duplicate key to the box where the lights are turned on.

Q. He had a key to do so?

A. Yes, sir, if he chose.

Q. Suppose you didn't turn them on and he didn't choose to, the lights wouldn't be turned on?

A. Well, the fall and winter period, the lights burn night and day. They burned night and day for quite a little while now.

Q. How often have you changed the globes?

A. I change every one, with few exceptions, that are changed in the circuit.

Q. You wait until they burn out until you change them?

A. Yes, sir. They are tungsten globes and that is the only time to change them.

Q. The globes have burned out?

A. Yes, sir.

Q. And when the globes have burned out, necessarily there was no light?

A. That is correct, sir.

Q. Now, what was the date the horse was killed that you referred to?

A. I couldn't tell you offhand.

[fol. 151] Q. It was before you moved back there?

A. No, sir, after I moved back there.

Q. Not in 1916?

A. No, sir.

Q. Did you see any people get out of the car behind the one that was stopped by the horse?

A. No, sir.

Q. Did you look if any one got out of it?

A. In the position I was in, clearing up the delay, I think I would have seen any one who had gotten out of that car.

Q. You are not positive whether any one did get out or not?

A. No, sir.

Q. What time does that flagman leave the Southern Railroad crossing that you know?

A. At 10:30 I usually see him leave there.

Q. Could it be possible for tramps to loiter and sleep on the stairway after 10:30?

A. It is possible.

Q. You don't know of your own personal knowledge whether or not it has happened?

A. To the best of my knowledge I have never found any person sleeping on the steps and viaduct.

Q. It could happen and you know nothing about it?

A. Yes, sir.

Redirect examination.

Mr. Kammer:

Q. You are not out there all the time, of course?
A. No, sir.
Q. Whenever you have been on the viaduct you have [fol. 152] never seen anybody doing anything of that sort?
A. No, sir.
Q. Those steps to the viaduct are in good condition, aren't they?
A. Yes, sir.

DUDLEY C. O'DOWD, a witness on behalf of the defendant, having been duly sworn by the court, testified as follows:

Direct examination.

Mr. Kammer:

Q. You are employed by the New Orleans Public Service?
A. Yes, sir.
Q. In what position?
A. Superintendent of Transportation.
Q. Do you know anything about the signals used and operated at the Franklin Avenue viaduct of the Gentilly Avenue line?
A. Yes, sir.
Q. When were these signals changed?
A. In October, 1924, they were installed.
Q. What kind of signals have you?
A. Nachard electric automatic signals.
Q. You had signals out there prior to that time?
A. Yes, sir. Old antiquated signals.
Q. Since the new signals were put in, in October, 1924, has there been any defects in the signals or have they failed to operate properly?
A. No, sir.
Q. You have had occasion to inspect the signals and [fol. 153] watch their operation?
A. Yes, sir.

Cross-examination.

Mr. Conkerton:

Q. Did you ever make any repairs to them?

A. Not personally, no, sir.

Q. Did any one under your supervision make repairs?

A. Not under my supervision, no, sir.

Q. Did any one directly under you or any one connected with the Railways Company make any repairs?

A. I suppose repairs have been made to them at times by the electrical department, but no one in our department.

Q. How many times have they been changed?

A. None that I know of. The signals are the same as installed in October, 1924. There has been no change in the signals.

Q. What change, if any, has been made?

Q. What change, if any, has been made?

A. None that I know of.

Q. Were they ever out of order?

A. I guess they have been, yes, sir.

Q. You say you know they have worked. Do you testify to that from your own personal knowledge?

A. Yes, sir, I had the signal installed. Before we had that signal, we had one unreliable—manually operated—and I had it changed to this particular type of signal.

Q. How many times, or how many different sorts of signals have you had out there since the signal was originally placed there?

A. That is the standard signal the Nachard people build.

[fol. 154] Q. What about the manual signal you spoke of?

A. That is an ordinary overhead switch. That is the old type. Coming off the single track the cars work that. A five light series connected up with the trolley and grounded to the rail. Three lights on one end and two on the other. And the motorman would throw that on with his hand, and from constant use the parts wore, and the vibration on the trolley would shake the contact out, which would automatically open. And that would permit the car on the other end to come in, because there was no light against it.

Q. Then the signal did become defective?

A. Prior to the installation of the Nachard, yes, sir. But not since the Nachard,

Q. You say you did not repair them?

A. No, sir.

Q. How do you know that?

A. What? I made an inspection. They had the manually operated one I described as out of condition. I made a personal inspection on that when I ordered that type of signal out, and learned the cause.

Q. Since 1924, how many inspections have you made of that signal?

A. I, myself? I suppose I have made as many as three or four a month.

Q. And never did find it out of order?

A. No, sir.

Q. Always working perfectly?

A. So far as my inspections were, yes, sir.

[fol. 155] Q. Do you know if it was over reported out of order?

A. I couldn't answer myself, but I would say it has been.

Q. Necessarily it had to be repaired?

A. Oh, yes.

Q. Then it has been out of order?

A. I didn't say it had. I said no doubt it has been repaired. I couldn't say of my own knowledge, no, sir.

Q. It could have been reported out of order and you know nothing about it?

A. That is possible, yes, sir.

Q. Has it been always in the same location?

A. No, sir. I think the location was changed to make it more advantageous for the operator of the car. When the signal was first set, I don't recall the date, I think it was set a little too close. And it has been testified prior to my testimony that sometimes the contact would not throw the proper signal. The motorman must have sufficient distance ahead of him to see that light, and I think it was carried a little further to make it safer for the operator.

Q. There is possibility that it may not work sometimes?

A. As has been testified prior to me, the contact sometimes, if the trolley wheel is out of line or something, and it might not register the first time, the motorman is in position to see that he does not get the white light, and backs up and changes the trolley and tries it over again. The light must be sufficiently far ahead of him for him to see it.

[fol. 156] Q. Whether they do back up and go over it again, you do not know personally?

A. I have seen that done, sure. I have been in the car it happened on.

Q. At the times when you were not there, you can not say what happened?

A. Surely not.

(At this point, the court adjourned for the day, and this case was continued until Tuesday, January 15, 1929.)

[fol. 157] [Title omitted]

Testimony Taken on Behalf of the defendant in the above entitled and numbered cause on Tuesday, January 15, 1929, beginning at 11:00 o'clock a. m., in open court, before the Honorable E. K. Skinner, Judge

[fol. 158] Testimony Taken on Behalf of the Defendant

Mr. I. O. MALL, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

Q. What is your name?

A. I. O. Mall.

Q. What is your profession, Mr. Mall?

A. Engineering.

Q. Are you a graduate of any school or college of engineering?

A. Yes, sir; I am a graduate of the Kansas State College.

Q. When did you graduate?

A. In 1918.

Q. Have you ever held any position with any college or University?

A. I have been employed by the Texas University and the Tulane University, teaching engineering.

Q. What practical experience have you had in engineering, outside of teaching?

A. Two years experience with Consulting Engineers, Harrington, Hand & Ash at Kansas City, Missouri.

Q. And how long have you been with the defendant company?

A. Since June, 1924.

Q. Are you familiar with the Franklin Avenue Viaduct in this city?

A. I am.

Q. What have you to say with regard to the construction of that Franlkin Avenue Viaduct, as to its design?

A. That viaduct has been constructed in accordance with an approved design.

Q. Are there any viaducts or bridges that you have seen or know of that have the same character of design?

A. I have seen innumerable structures over the country designed in the same way, the same principles.

[fol. 159] Q. Now, Mr. Mall, how is that viaduct maintained by the company; what is its policy with regard to it?

A. I may define that policy by stating, first, that a timber structure, such as this viaduct is, is constructed with a full knowledge that it will require periodical maintainance. A timber structure to degenerate, or deteriorate, as soon as it is built, so that it is constructed in such a manner that the various parts may be renewed. The policy is predicated upon practical judgment based upon economy of renewals, that is, if members of the structure show deterioration they can be removed and renewed. Our policy follows that of its predecessor company.

Q. What do you consider as proper maintainance of a structure of the character of that viaduct?

A. That is a difficult question to answer. Consideration must be given to the fact that as originally constructed that type of structure is many times stronger than it need be, due to the fact that deterioration will occur, and they take care of that deterioration by making the members larger and stronger than they need be, so that as members are renewed the others members will be sufficiently strong enough to permit the renewals to be made. Timber is subject to deterioration and it is treated with some process that will slow up its deterioration, and those treatments are limited to the timber and protect certain parts of the timber; and those parts not treated and more susceptible to deterioration will starte to decay first, and when the decay

reaches *reaches* an advanced point the proper policy is to renew that part.

Q. How often is that viaduct inspected by the company?

A. The deck of the structure, the rails and ties and the part that can be seen on top, is covered by a track inspec-
[fol. 160] tor once a week who walks over the structure and notices the parts for which he is responsible. The substructure is inspected by our engineers, giving it casual inspection at monthly intervals, and a detailed general inspection at quarterly or three month periods.

Q. What would you say was the carrying capacity of that viaduct; have you any idea?

A. The carryin*f* capacity of that viaduct by the support of its piles. due to the penetration into the ground; that is the weaker parts of the structure. The part above the ground is many times stronger *is many times stronger* than the supporting piles in the soil. That viaduct could carry safely three times the load that goes on it at present operation.

Q. There was some testimony given with regard to a "guard rail." What is the purpose or function of a guard rail?

A. The guard rail is an auxiliary rail inside the running rail on each side. Its functi*l*n is to keep a derailed car from going off the viaduct. It is customary practice in all railroad construction; it will cause the derailed car to run over the ties instead of going off the viaduct sidewise.

Q. Mr. Mall, as I understand it, the viaduct, and the trac*h* structure is built on piles into the ground over which piles are placed across, at right angles across the v'aduct, and those piles placed in that position are called "Bents"; is that correct?

A. The "bent" is that portion between successive rows of piles.

Q. What is the weight o*s* the cars that operate over that viaduct?

A. Twenty-two tons.

Q. What would be the weight of those cars, or one of
[fol. 161] those cars loaded with passengers to its maximum capacity?

A. 175 people, average 140 pounds each, will weight 24,000 pounds or 12 tons; total weight of 34 tons.

Q. When you speak of 175 passengers, that is not anywhere near the normal carrying load of a street car, is it?

A. The seating capacity of *of* one of the cars is 52 passengers; 175 passengers means that every available inch of space will be croweded with passengers.

Q. Does the weight of a car loaded to its maximum capacity as you described amount to 34 tons, or 68,000 pounds, car and passengers?

A. Correct.

Q. Now, what would you say would be the load that each bent in that structure would carry?

A. That depends upon the physical dimensions of the car. The cars that operate over the Gentilly road are double truck cars, two trucks with four wheels on each truck. Those trucks are spaced two—two feet, from center to center. The bent spacing of the viaduct is 15 feet; that limits the load that may go on any one bent to 50 per cent of the car load, of 17 tons.

Q. Now, if that bent be composed of four piles, will you say that a load of 17 tons would be equally distributed over the four piles?

A. Yes, sir.

Q. In other words, each one of the four piles would carry one-quarter of seventeen tons, or 4¼ tons?

A. Correct.

Q. Speaking of the load of a car with 175 passengers?

A. Correct.

Q. Now, Mr. Gaudet the other day testified that pile "C", the pile on the lower side of the viaduct in bent No. 1, in his opinion was dangerous, and that the entire bent be-
[fol. 162] cause of that one pile being dangerous became dangerous. He also stated that as a street car went over that bent there was considerable swaying of the car. I will ask you first if you have carefully examined that bent and particularly the piles in bent No. 1 testified to by him?

A. I have.

Q. Have you observed car going over that viaduct and noticed whether or not there was any swaying of the car?

A. I have ob-ered a car going over the viaduct, and there was no appreciable swaying as it went over the viaduct.

Q. Can any swaying be noticed with the naked eye, looking at the car itself?

A. I may say No. I would like to modify that statement by saying this, that any car moving down the street sways, due to *to* its construction and the construction of the track. There are springs on the trucks of the street cars that allow a slight sidewise motion which occur whether they are on a level track or not or wherever it may be.

Q. Do street cars sway when going over a track that has a concrete foundation, like Canal street, for instance?

A. Yes, sir.

Q. Now, did you examine those particular pilies, A, B and C?

A. I did.

Q. Did you make any particular test in regard to tjose piles?

A. I had pile C, which was criticised the most severely, moved and I placed the pile in a testing machine to see in what condition it was; it took a load of 375,000 pounds to make that pile crack.

Q. Now, at the point where you had a pressure of 375,000 pounds and it cracked, would you say that that was the failing point of that tie?

A. I would not. The capacity of our machine was limited, and we could not break the pile. The crack referred to [fol. 163] might be called the initial failing point. If the load or pressure applied were increased it would ultimately reach the point where the fibrous construction of the pile would break.

Q. As I understand your testimony, that pile put in this testing machine did not show any evidence of cracking until you reached a pressure of 375,000 pounds?

A. Correct.

Q. And I understood you to say that the load of a street car, loaded to its ultimate capacity with 175 passengers was thirty four tons?

A. Correct.

Q. And you distributed that 34 tons over 2 Bentz consisting of four piles each, each pile carrying its proportion of the load?

A. That is correct, with the exception that in Bent #1 there are only three piles.

Q. Well, in Bent #1, what number of pounds would be on each pile?

A. 17 tons divided by three, or five and two third tons.

Q. In other words, five and two third tons on each pile?

A. Yes, sir.

Q. What is that expressed in pounds?

A. Roughly, 11,500, approximately.

Q. In other words, it took approximately 12 times the amount of pressure to crack that pile, while the greatest load, a street car loaded with 175 passengers, was the greatest load that went on it?

A. That is correct.

Q. Now, that particular pile was rotted at the heart, and that is the pile that Mr. Gaudet testified had only the shell left?

A. Correct.

[fol. 164] Q. And that was the worst pile, or the pile that showed the greatest amount of deterioration in the entire viaduct?

A. Correct.

Q. Now, when do you renew the stringers on the viaduct?

A. When they show what we term "An advanced decay". A stringer is creosoted lumber, and the heart is not treated. Moisture gets into that part, fungus actions starts and it rots, leaving practically a shell, and when in our judgment that decay has become extensive we renew that piece.

Q. And at the time that you renew that piece, do you consider that stringer decayed to the point of danger?

A. No, sir.

Q. You renew it long before it reaches that point?

A. We do.

Q. When do you renew the caps?

A. The caps are renewed in the same way, the same statement will hold for the caps. They are larger pieces of timber, better shaped to receive treatment, but subject to the same deterioration and the same procedure follows the renewal of them.

Q. Would you say that the same procedure is followed in the renewal of piles?

A. No, sir.

Q. How do you renew them?

A. The piles are driven in the ground, and that portion that is driven into the ground, as we know, has an indefinite life. The portion above the ground is subject to deteriora-

tion, so the deterioration starts at the top, due to the fact that moisture can enter the center on the top and starts down the center of the pile; and when it gets down four or five feet it is good economic maintenence to cut off the top and replace it with a new piece, in which case we have the equivalent of a new pile. If the deterioration is at the [fol. 165] bottom the procedure is to excavate to a depth where we can get in the ground and replace from that point up.

Q. Now, that is done from time to time in accordance with your monthly and quarterly inspections?

A. Correct.

Q. Now, what are the sizes of the stringers?

A. Seven" by 14".

Q. Mr. Gaudet testified the other day that those stringers are 7" by 12"?

A. He had an erroneous impression.

Q. Have you actually measured them?

A. I have.

Q. And there are two 7 by 14 stringers on each side of the track structure?

A. Or four over each bent.

Q. Now, Mr. Gaudet also in his testimony stated that piling in that viaduct showed what he called "Checks", and I think he said that the checks were a cracking of the pile, and by innuendo meant that was due alone to the stress on the pile. Do any of those piles out there show what may be termed "weather check"?

A. That is the only form that does show, weather checking. The magnitude of the load is insufficient to produce checking.

Q. And all of this checking out there is weather checking?

A. Correct.

Q. Does weather checking affect the strength of the piles?

A. I would say not, but they showed several checks, some as great as one sixteenth of an inch wide, and apparently they had no effect on the strength of the piles.

Q. Now, there are two concrete pillars, or supports, one on each side of the Southern Railway, supporting the steel structure. Mr. Gaudet testified the other day that he had examined the piling under that concrete pillar, and the pil- [fol. 166] ing from what he could see from the outside

showed a decided decay or deterioration. Do those pilings under those concrete pillars have any real effect in supporting those concrete pillars?

A. In the construction of such a pillar sufficient pil/ing is driven into the ground to support the load of the pillar plus the load of the bridge with an ample margin of safety, and it is not considered that they add to the carrying capacity.

Q. What are the sizes of those pillars, do you remember?

A. I would have to estimate that; is that sufficient?

The Court: I don't see the necessity of going into that.

Mr. Kammer, continuing:

Q. Mr. Mall, did you examine the pilings under those pillars?

A. I examined the pilings that could be seen from the outside.

Q. What did you find?

A. I found them to be decayed, but not to the extent that they are not able to carry their load. They are still able to carry all the load that they have to carry.

Q. Now, were you present, or do you know anything about the inspection that was made by Mr. Gaudet and the assistant engineers in 1926?

A. I was not present. I only know that the inspection was conducted in that the matter was reported to me.

Q. Were the defects pointed out by Mr. Gaudet at that time corrected?

A. He reported a condition in one particular bent that he considered dangerous, and that was immediately corrected.

Q. And he also reported some piling which he thought should be corrected or renewed?

A. He did.

[fol. 167] Q. Were those piles renewed?

A. They were not.

Q. Why not?

A. In our judgment they had too much good life in them. They were ample safe, so we did not renew them.

Q. And the cars have been going over that viaduct for two years since that inspection?

A. They have.

Q. And no further deterio-ation or evidence of decay has shown up in those piles?

A. They are practically in the same condition today as they were in 1926.

Q. And your judgment is that those piling are sufficiently strong to carry the weight put on them?

A. That is correct.

Q. Mr. Mall, there was some testimony the other day about doing some work on the viaduct within the last few weeks. How often, say, since 1926 was any work done on the viaduct?

A. We have worked on that viaduct various times since 1926. Our records show that work was done in November 1926, February, March, May, August, September, November and December, 1927, and in October, November and December, 1928.

Q. In other words, the work that was being done was the work that naturally goes along in the ordinary routine and shown to be advisable when inspections are made by the company?

A. Correct.

Q. How many railroad track- are there at the Southern Railroad crossing?

A. Eight.

Q. And how many at the L. and N. crossing?

A. Three.

Q. Now, even though there is no viaduct at the L. & N. crossing, is it not obvious that the viaduct over the South-
[fol. 168] ern crossing lessens the danger at the grade crossing?

A. Yes, sir.

Q. Would not a grade crossing at the Southern Railroad tracks be just as dangerous, if not more so, now than in 1910 when the viaduct was constructed?

Mr. Conkerton: Objected to as calling for an opinion.

The Court: The objection is maintained.

Mr. Kammer, continuing:

Q. Mr. Mall, Mr. Weiler said the other day he had reported bent No. 13 in his inspection in 1926 as not being in a safe condition; was that bent repaired or corrected?

A. I cannot answer that; it may or it may not have been corrected. I believe he stated, however, that it had been corrected.

Q. Mr. Mall, there has been some testimony the other day with regard to a motorman and a conductor debating as to whether or not they would go over the viaduct when a wind was blowing; can you tell us just what wind pressure would be necessary to overturn a car on that viaduct?

A. Somewhere between nine and one hundred miles velocity.

Q. In other words, the wind would have to be blowing ninety or a hundred miles in order to turn a street car over on that viaduct?

A. Correct.

Q. And that would apply anywhere in the City?

A. A street car would be more apt to turn over on the level ground than on the viaduct.

Q. Why is that?

A. There is a current action near the surface of the ground which creates a suction, which is more evident as the elevation increases.

[fol. 169] Q. Taking the viaduct as it is, which the criticism of it by Mr. Gaudet, what would you say in your opinion as an engineer as to its safety or unsafety?

A. I would say that it is very safe.

Q. Suppose I ask you this hypothetical question: If you take the viaduct as it is to-day and make no repairs or replacements, the viaduct was to remain the same condition as it is to-day, how long would you say the viaduct would be safe to carry up street cars?

A. Conservatively, five years.

Q. In other words, that viaduct would last 5 years longer without any repairs being made to it as this time?

A. Correct.

Q. But you do make repairs constantly?

A. Yes, sir; economical maintenance requires that.

Q. Now, Mr. Mall, at my request did you examine the books of the company to find out what the viaduct cost the company?

A. Yes, sir.

Q. What was the total amount?

A. $58,189.00.

Q. Now, what is the estimate of the cost of demolishing the viaduct and to build a double track crossing over the Southern Railways tracks at grade?

A. $137,000.00.

Q. That is the approximate estimate?

A. Correct.

Q. In other words, if you take down the viaduct and build a double track crossing over the Southern Railway crossing at grade, it would cost the company the loss of $58,189.00, which now stands as the value or cost of the viaduct, in addition to the $137,000.00, or $195,000.00?

A. Correct.

[fol. 170] Q. Now, subject to the plea of estoppel and not waiving same, I desire to examine this witness on the following: Now, Mr. Mall, what is the present width of the present embankment, approach, at its widest point, that is, down on the ground surface?

A. 62 feet.

Q. What is the width of the roadway at that specific point?

A. On the uptown side, the roadway is 28 feet wide, on the downtown side it is 18 feet wide.

Q. What is the width of the approach crossing Florida Walk Canal?

A. On the downtown side the approach is 19 feet wide.

Q. Did you measure the width on the upper side?

A. Yes, sir.

Q. What is it?

A. 24 feet.

Q. In other words, on the upper side the bridge is 4 feet narrower than the roadway?

A. Correct.

Q. And on the upper side the bridge is only 19 feet wide?

A. Correct.

Defendant's Mall-1

At this point I offer, produce and file in evidence blue print of tract #5, 4639-6 of the New Orleans Railways and Light Company, showing the proposed fill on the viaduct at Franklin Avenue, which I will mark Mall-1.

It is admitted by Counsel for Plaintiff that the signature of W. J. Hardee, City Engineer, as shown on this plan is correct and likewise the signature of E. E. Lafaye, Commissioner of Public Property in 1914 under whose jurisdic-

[fol. 171] tion the City Engineer worked and this plan is approved February 25, 1915.

Mr. Kammer, continuing:

Q. Now, Mr. Mall, I ask you to look at this plan and show me what the width of the neutral ground is, as shown on that plan?

A. 62 feet.

Q. What is the width of the space between the neutral ground and the property line?

A. 30 feet.

Q. And what is the width of the entire street from property line to property line?

A. 128 feet.

Q. Would you be willing to say that the urban embankment and approach to the viaduct occupies the same position to-day as it is shown to occupy on that plan?

A. I would.

Q. Mr. Mall, at the point where it is contended to fill the encroaches on the roadway, what is the width of the sidewalk?

A. On the City side of the viaduct, the sidewalk is ten feet.

Q. And what is it on the lower side of the viaduct?

A. 12 feet.

Q. In other words, the 12-foot sidewalk and the 18-foot roadway makes up the thirty feet as shown on this plan between the neutral g-ound and the property line?

A. Correct.

Q. Would you say that the fill of the urban embankment of that approach to-day is at it is shown on this plan?

A. I would.

Q. Mr. Mall, was the slope of that fill cut off during the time that paving was being done there?

A. It was.

[fol. 172] Q. And yould you say that that neutral ground at that time was that slope where it is cut off, on the line shown by this plan?

A. I would.

Recess twelve thirty p. m. to one thirty p. m.

Cross-examination.

By Mr. Conkerton:

Q. On this blue print offered in evidence, marked Mall-1, you say this indicates the width of the street is shown as only 18 feet?

A. I beg your pardon?

Q. (Question read by stenographer.)

A. I said the distance from the property line to the neutral ground curb was 30 feet.

Q. And this indication of the street width is really from the property line?

A. Yes, sir.

Q. And not from the curb line?

A. There is no curb shown on that print.

Q. Do you know the present width of the street?

A. Yes, sir.

Q. How wide is it?

A. At what point, please?

Q. Where the incline commences?

A. On the City side?

Q. On the City side?

A. 28 feet, each roadway.

Q. And where the earthen embankment extends to the street, how wide is it?

A. It converges to a width of 18 feet.

[fol. 173] Q. Does not the fill of the earthen embankment extend to the street on the lower side?

A. I think there has been times when the earth has washed over the street; yes.

Q. Is it not a fact that there is a projected line around the earthen embankment—in other words, is not the width of the street reduced from 28 feet, to 18 feet, as you say?

A. Correct.

Q. Does this blue print show the earthen fill on the City side, or river side, as going over the neutral ground width?

A. It does not.

Q. But actually it does?

A. Actually it does not. There is a bulkhead there to hold it to the curb line also.

Q. If the street is reduced from 28 feet to 18 feet, it does not extend into the street?

A. The street you are speaking of has been created by the City Planning Department in 1927.

Q. The figure of $58,189.00 which you say in your direct testimony was the value or cost of this viaduct; is that correct?

A. Everything from where the incline starts to where it recedes on the other ..

Q. Do you know whether there has been any depreciation charged off that cost since the construction in 1910?

A. I do not.

Q. Do you know the original cost of the viaduct proper?

A. I do not.

Q. Then, in arriving at that figure of $58,189.00 you do not know whether any depreciation has been taken into consideration?

A. That is the face value on our books.

Q. And that it cost, as you say, $58,189.00 to construct [fol. 174] the viaduct from the commencement on grade to the end on the other side, and you don't know whether any depreciation has been charged off that figure or not?

A. That is not the cost of the viaduct; that is the valuation placed on the viaduct at the time this company was organized.

Q. If the viaduct cost $58,189.00 in 1910 to erect, it would not be worth $58,189.00 if proper depreciation was charged off?

A. Presumably not.

Q. And you don't know the present value of the viaduct as compared with the original value with depreciation charged off?

A. No.

Q. In the recent work done by the Public Service, how many piles were put in and removed?

A. I don't know.

Q. You were in charge of that work?

A. I was.

Q. And you cannot say how many piles were put in or how many were taken out?

A. I cannot.

Q. Did you make a written report of your examination?

A. No, sir.

Q. Some piles were taken out?

A. A number were partially renewed; no piles were completely taken out.

Q. Were they decayed?

A. They were.

Q. And for that reason they were removed?

A. Yes, sir.

Q. For what reason, from an engineering standpoint, were those piles driven and used under the concrete column?

A. To support the load.

Q. If they rotted out to-day, do they support the load intended?

A. They do, as long as sufficient material is left to carry [fol. 175] the load.

Q. Do you know if sufficient material is left to carry the load?

A. Those that I have seen have sufficient material to carry the load.

Q. How many did you see?

A. Twelve.

Q. Of those twelve that you saw, how many showed deterioration or rot?

A. All of them.

Q. And for what depth did you examine them?

A. About a foot from the top.

Q. What percentage of rot or deterioration did they show?

A. From ten per cent to about fifty per cent.

Q. If no piles were driven, would the ground hold that column?

A. That statement can only be answered by calculation.

Q. Well, you answer it.

A. I will have to know the size of the structure out there and make a calculation to answer your question.

Q. The piles in the structure in general do show checking or cracking; do they not?

A. They show weather checking.

Q. Whether you term it weather checking or anything else, it is checking?

A. The only thing I can see out there is weather checking.

Q. As to this pile that was put on a test; was the whole pile removed?

A. No; only the portion above the ground.

Q. That pile had deteriorated?

A. It had.

Q. Now, if a stringer does not make contact on the outside pile, would there be any swaying in a car passing over it?

A. You mean to ask me if a cap does not make contact?

[fol. 176] Q. Well, the cap?

A. It will, if the other piles are not supporting the load.

Q. Does not the center pile support the load?

A. It can and does.

Q. Which support the greater load?

A. If properly constructed, they support an equal load.

Q. What do you mean by economical maintainence?

A. That means that when the component parts of the timber deteriorate they should be removed and replaced with new timber.

Q. How often has timber been replaced in that viaduct?

A. I don't know.

Q. Then you mea nto say that economical maintainence has been carried on?

A. Altogether; yes, sir.

Q. Since what date?

A. I would say for ten years since it was constructed very little of it was done.

Q. I want you to tell the Court the date?

A. Since 1925 economical maintainence has obtained.

Q. And prior to 1925?

A. I know nothing of it.

Q. And you have been connected with that company since 1925?

A. 1924.

Q. What do you mean by "Casual inspection"?

A. Visual inspection, watching the action of the members of the structure as the cars pass over it to see if there is any surplus movement when a load is applied.

Q. Do you consider that inspection as good an inspection as that in which the members are tested separately—for instance, if they found a check or rot or crack; if some particular examination were made to each of those mem-

[fol. 177] bers would that examination be superior to a casual inspection?

A. It would?

Q. Did you make the track inspections, or who would make them?

A. I don't know.

Q. Then, when you testified that track inspections were made, you know nothing about them?

A. I certainly do.

Q. Of your own personal knowledge?

A. Yes, sir.

Q. And you did not make the inspection?

A. I did not.

Q. Were you with the parties when they made the inspections?

A. On some occasions I have been with the parties when they made the track inspection.

Redirect examination.

By Mr. Kammer:

Q. Mr. Mall, you spoke of "Casual inspections". As I understood you on direct examination, those were inspections made monthly?

A. Monthly; yes, sir.

Q. And what were those made quarterly?

A. They are detailed inspection in which each member of the structure is given detailed attention.

Recross-examination.

By Mr. Conkerton:

Q. When did you make the last detailed inspection?

A. In December.

Q. Did you make that inspection yourself?

A. No, sir.

Q. By whom were you assisted?

[fol. 178] A. Mr. Guillot and Mr. Drennen.

Q. Are they connected with the company?

A. They are engineers in the department I am head of.

Q. Prior to that what was the most recent inspection?

A. I cannot give you a date on that, but our records will show it.

Q. In all of those detailed inspections that were made, you, Mr. Guillot and Mr. Drennen were the only ones that made those inspections?

A. Yes, sir; but it is possible that Mr. Guillot made have assigned some other engineers to do the work at times.

Q. But whether he did have anyone else to do the work, you don't know?

A. I don't remember.

[fol. 179] Mr. Albert H. Guillot, a witness for the Defendant after being duly sworn by the Court, testified as follows:

Direct examination.

By Mr. Kammer:

Q. Mr. Guillot, what is your position with the defendant company?

A. Assistant engineer.

Q. As assistant engineer, did you have occasion to inspect the Franklin Avenue viaduct?

A. I did.

Q. Were you present at the inspection made in 1926, I think?

A. I was.

Q. Did you make an independent inspection at that time?

A. I did.

Q. Did you also inspect at the same time with Mr. Gaudet, the assistant City engineer, who was making an inspection?

A. Well, while I was making my inspection Mr. Gaudet was supposed to make a joint inspection. We started together but he did not continue with me.

Q. And you continued to make your own independent inspection?

A. I did.

Q. At the time, did you find any members of the pile structure that was in a dangerous condition?

A. Not that I considered a dangerous condition.

Q. At that time, Mr. Weiler testified that bent #13 was in a dangerous condition; was that bent repaired?

A. That bent has been repaired recently.

Q. Was that bent repaired because it was considered to be in a dangerous condition?

A. No, sir.

Q. Did you make another more recent inspection of the viaduct?

A. Yes, sir; in December.

Q. At that time, did you find any parts of the viaduct that you considered in a dangerous condition?

[fol. 180] A. I did not.

Q. Now, Mr. Gaudet testified with particularity as to bent #1 on the City side of the viaduct; did you examine that bent?

A. I did.

Q. Did you consider that bent in a dangerous condition?

A. I did not.

Q. Were you present at the test that was made of pile in bent #1 that Mr. Mall testified as having been made?

A. Yes, sir.

Q. And what would you say was the stress that was placed on that bent up to the point where it was supposed to show the evidence of cracking?

A. Three hundred eighty and some odd thousands of pounds.

Q. Do you know anything about those periodical monthly or quarterly inspections that were made?

A. Yes, sir.

Q. What was the character of the inspections that were made?

A. A quarterly inspection, which is a detailed inspection in which we checked all of the structu-al timbers to determine their condition, and replacements made when necessary, as we make notations of the timber that should be watched and repaired at such times as our maintanence organization can get to the viaduct to make the repairs.

Q. And those points that you found needed replacements from a- economical maintanence standpoint, they were made from time to time?

A. From time to time; yes, sir.

Q. Have you had any experience with bridge or trestle work?

A. I have had some limited experience.

Q. What would you say as to the design of that viaduct?

A. I would say that the design of the trestle structure is [fol. 181] in accordance with practice on that type of structure.

Q. In your opinion, would you say that the viaduct was in a safe or in a dangerous condition for the carrying of street cars over that viaduct loaded with passengers?

A. I would say that it is in a safe condition at the present time.

Q. Have you noticed any checking or cracking at the times of your inspections

A. I have noticed some checking?

Q. What character of checking was that?

A. Season or weather checking.

Q. Not due to the weight or loads of the cars goi-g over the viaduct?

A. No, sir; I would not consider those checks as stress checks.

Cross-examination.

By Mr. Conkerton:

Q. A pile that is checked or cracked, is that pile as strong as one not checked or cracked?

A. Well, I would think, that a pile that is not checked at all would be slightly stronger.

Q. Do you know anything about the guard rail over the viaduct?

A. Yes, sir.

Q. At what point does that guard rail commence?

A. From a point on the embankment over the entire length of the trestle.

Q. Is the guard rail over the entire length of the embankment?

A. I am quite certain it is.

Q. Are you sure of that?

A. Yes, sir; I am quite sure.

Q. You cannot be mistaken about that?

A. I don't think so; I am sure there is a guard rail right at the very end of the embankment.

[fol. 182] Q. You have been out there time and time again?

A. Yes, sir.

Q. And yet you cannot say whether it commences at the end of the embankment or not?

A. It commences one hundred feet or so from it.

Q. It is not true that it is only over the trestle work?

A. No, sir.

Q. Were you furnished with a report of Mr. Gaudet's findings?

A. I was not.

Q. Do you know if the company was?

A. I do not.

Q. Do you know if the company has possession of such a report?

A. I do not.

Mr. Kammer: You mean the 1926 report?

Mr. Conkerton: Yes.

Mr. Conkerton, continuing:

Q. Why was bent #13 repaired?

A. We were making a few repairs, which is our practice of making periodic repairs.

Q. It was not repaired because it was dangerous?

A. No, sir.

Q. Or because the pile had rotted?

A. It had rotted some.

Q. And not because it was in a dangerous condition?

A. No, sir.

[fol. 183] Mr. Kammer: (at beginning of testimony stated): Mr. Ballast is still out of the city and I am willing to continue with my case, reserving my right to examine him.

The Court: Very well, go ahead.

Mr. E. S. Myers, a witness for the defendant, after being duly sworn by the Court, testified as follows:

Direct examination.

By Mr. Kammer:

Q. You are connected with the defendant in this case, the N. O. P. S., INC?

A. Yes, sir.

Q. In what capacity?

A. Assistant to the Vice President.

Q. As assistant to the vice-president, just what are your duties?

A. My present duties are, at present, to look after the street railway end.

Q. Will you please tell us what the present schedule is on the Gentilly line?

A. The present schedule on the Gentilly line goes from a three to three and a half minute headway; that is, during the peak hours.

Q. How does that schedule compare with the schedule on other lines of the system?

Mr. Conkerton: Objected to as irrelevant and immaterial. [fol. 184] Mr. Kammer: According to the petition here the service is inadequate and that furthermore with a single track over the viaduct there is no possibility of bettering that service. They have attempted to show here an increase in population back of the viaduct.

The Court: Let the objection go to the effect.

Mr. Conkerton: The objection will apply to all similar questions withour the necessity of repetition.

Mr. Kammer, continuing:

Q. Answer the question?

A. There are only six other lines that have a better schedule than the Gentilly line does, with a total of 22 lines, excluding the above line.

Q. I show you a statement which you made up for me, and which I will mark Myers-1, and ask you if you made that statement and what it shows?

A. Yes, sir; I made up that statement. It shows the number of passengers carried annually on the Fret, Laurel, magazine, St. Charles, St. Claude, Tulane and Gentilly lines. All of those lines carry from one-third (1/3) to approximately three (3) times more passengers than does the Gentilly line.

Q. Now, I notice that under the heading "Passengers carried" there are figures. Taking the first figure, for instance, 7499; would that mean thousa*m*-ths?

A. No; millions. We do not pay attention to the last [fol. 185] three figures. That is, we abbreviate the figures.

Q. Millions rather than thousands?
A. Yes, sir.
Q. 12,914, as I under that figure, you read 12,914,000?
A. Yes, sir.

Defendant's Myers-1

Counsel for defendant offers, produces and files in evidence the statement identified by the witness and marked for identification Myers-1.

Q. Now, Mr. Myers, taking the single track over the viaduct, is it possible to shorten the headway, or, in other words, shorten the schedule?
A. It can very materially be done and a reduction made in the headway.
Q. And that can be done by double tracking the viaduct?
A. Yes, sir; but that statement (Myers-1) was made on the track arrangement there right now.
Q. Now, Mr. Myers, I show you exhibit Defendant-5 and Defendant-6, Sdefendant-5 being the total number of passengers carried on the Gentilly line from 1922 to 1928, expressed in figures of passengers; and Defendant-6 being the same thing, except that it is expressed in revenue earnings by years,—in other words, the fares received from passengers in that time. You will note that beginning with the year 1922 there is a gradual increase in the number of passengers carried up to 1925 and then there is a gradual decrease down to 1928, with the exception of the last year which shows a slight increase for 1927; and I will ask you [fol. 186] if that decrease in the number of passengers carried since 1925 is peculiar to the Gentilly line or if that applies to the entire system, all roads operated by the Public Service?
A. That applies to all of the lines; and we think it is due to the increased use of automobiles. The effect of this decrease you can also see on the earnings, and that applies to all lines alike.
Q. In other words, all the lines operated by the company show a decrease in the annual earnings?
A. Yes, sir.
Q. Mr. Myers, there was some testimony offered the other day on behalf of the plaintiff in this case with regard to

the rocks on the side of the fill, or approach, where the embankment is by the tressle work of the viaduct, and some testimony given with regard to an automobile having struck one of the rocks in the roadway; do you know anything about those rocks?

A. Those rocks were ordered placed there by Commissioner Black. It was his intention to crush them and put them in that particular neighborhood. Our company was ordered to put them there, but they belong to the city.

Q. You say those rocks were ordered by Commissioner Black to be taken out there by your company and deposited on the side of that fill?

A. Yes, sir.

Q. And the company was paid by the city for hauling those rocks out there?

A. Yes, sir.

Q. Do those rocks belong to the company?

A. No; to the city.

[fol. 187] Q. What became of those rocks?

A. Mr. Black, connected with the Ford, Bacon & Davis company came to us and they wanted to purchase those rocks to do revetment work along the Ponchartrain Bridge, and I informed Mr. Black that those rocks did not belong to us but they belon-ed to the city.

Q. And those rocks were afterwards removed?

A. Yes, sir.

Q. You had nothing to do with the removal of those rocks?

A. No, sir.

Q. Now, when you spoke of the rocks being ordered there by Commissioner Black, you mean the Commissioner of the Commission Council?

A. Yes, sir; the ex-Commission of the last administration.

Q. Now, Mr. Myers, there was some testimony likewise given about an accident which occurred at the time of the paving of the lower side roadway, at the time when the roadway was a roadway for two-way traffic, some automobile having run into the side of the embankment, and something was said about the red lamp; do you know anything about that?

A. Yes, sir; Mr. Ballast in the latter part of October, 1927 requested me to have a lantern placed on the upper side of the roadway until the bridge had been put in by the Commission, and we did it as a courtesy to the city and to Mr. Black with no responsibility on our part.

Q. You spoke first to Mr. Ballas?

A. Yes; the city engineer.

Q. Now, Mr. Myers, I show you some photographs which were taken of the Gentilly viaduct, and I ask you if you know anything about the taking of those photograps; do [fol. 188] you recognize them?

A. (Looking at photographs.) Yes, sir.

Q. Now, I will first show you a photograph, which I will mark Myers-2, and ask you to explain to the Court what that photograph represents?

A. This photograph was taken from the viaduct, looking out over the downtown side towards the Sewerage & Water Board's pumping plant. Over on the lake side you can see very plainly the city sewerage yard.

Q. Now, I show you photographs marked Myers-3 and Myers-4 and I ask you what they represent?

A. This photograph, Myers-3, was taken to the left of photograph Myers-2, and is looking towards the lake. You can again see the garbage dump and the sewerage yard. Photograph Myers-4 is looking from the viaduct towards the river from the right of where photograph Myers-2 was taken, and shows the Florida Walk canal and the prairie in between.

Q. Now, I show you photographs marked Myers-5, 6 and 7, and ask you to explain what those photographs represent and the direction from which they were taken?

A. Photographs Myers-6 was taken from the viaduct, looking on the uptown side of the viaduct; Myers-7 was taken to the right of where Myers-6 was taken, looking towards the uptown section, and photograph Myers-5 was taken looking towards the river side of the viaduct.

Q. Those last three photographs that you have identified and explained, they look towards the city side of the viaduct?

A. Towards the city side of the viaduct.

Q. Now, I show you photographs marked Myers-8, 9, and 10, and ask you to explain those photographs?

[fol. 189] Q. Myers-8 was taken at approximately the river end of the viaduct looking towards the lake. It shows the slight encroachment of the roadway and also the encroachment which the bridge forces across the Florida Walk Canal. Myers-9 was taken at some point in the neighborhood of the encroachment looking towards the lake, and shows the narrow roadway caused by the bridge across the Florida Walk Canal. Myers-10 was taken in the vicinity of the bridge across the Florida Walk Canal looking towards the river on the uptown side of Franklin Avenue.

Q. The three of these photographs are on the downtown side of Franklin Avenue?

A. Yes, sir.

Exhibit—Defendant's Myers 2 to 10, Inc.

Counsel for defendant offers, produces and files in evidence the photographs marked "Myers" to Myers-10, inclusive, which were identified and explained by this witness.

Q. Now, Mr. Myers, was the defendant in this case, the New Orleans Public Service, Inc., ever served with official notice of an official hearing with regard to the removal of this viaduct by the Commission Council of the city of New Orleans?

A. No, sir.

Q. Was there ever any complaint served on you and the time fixed for an official hearing, the taking of testimony, the filing of your answer, or report, or anything of that sort?

A. No, sir.

Q. Now, subject to the plea of estoppel and without waiving same, I now desire to ask Mr. Myers the following question: Was there ever any complaint made to the Company, [fol. 190] or its predecessors, the New Orleans Railway & Light Company, at the time of the erection of this viaduct that the viaduct was not erected in accordance with the terms of the ordinance No. 6445?

A. We can find no record in any of our files where the city ever complained that the viaduct was not in accordance with the plans and specifications.

Q. Was any complaint ever made by the city since the viaduct was not properly constructed?

A. No, sir.

Q. Now, Mr. Myers, there was some testimony the other day with regard to the number of streets being closed or blocked by the viaduct. Just how many streets are there down there that are cross streets on Franklin Avenue that are blocked or obstructed by the viaduct?

A. Two streets: Law street on the river side and Agriculture street on the lake side.

Cross-examination.

By Mr. Conkerton:

Q. Did you or the counsel of your company ever appear before the Commission Council during the hearings had on the adoption of the ordinance for the removal of the Franklin Avenue viaduct?

Mr. Kammer: Objected to, unless it be shown that an official hearing of the kind or character required it when the city of New Orleans, or Commission Council states that is a — under the city charter.

The Court: The objection goes to the effect.

[fol. 191] A. We never received any official notice.

Mr. Conkerton, continuing:

Q. I ask you, did you or any officer of your company, or counsel or attorney for your company, appear before the Commissiin Council during the hearing had upon the ordinance for the removal of the viaduct?

A. There was only one hearing had, and at that time our company was represented.

Q. That was at the meeting held on November 2nd?

A. I don't remember that date.

Q. I read you an abstract of the meeting of the commission council of November 2, 1926, as to the appearance of counsel for your company, on page 3 "Mr. H. Generes Dufour, representing the New Orleans Public Service and Mr. M—— addressed the Council on the ordinance adopted"; is that correct?

A. Yes, sir.

Exhibit: City-E

Counsel for plaintiff offers, produces and files in evidence a certified copy of the official proceedings of the Commission Council of the city of New Orleans November 2, 1926, marking the same City-E.

Mr. Kammer: Same objection, that that is not the kind of official hearing contemplated or provided for by the charter as regulatory.

The Court: The objection goes to the effect.

Mr. Conkerton, continuing:

Q. You testified regarding a red light having been placed on Franklin Avenue—on what side of the street was that light placed?

[fol. 192] A. On the down town side, going towards the lake.

Q. And that light was placed there, not because of any responsibility upon your company, you say?

A. Yes, sir; it was at the request of Mr. Bellas, city engineer.

Q. You felt there was no duty on your company's part to place the lamp there?

A. There was no duty on the company's part to place the lamp there.

Q. Notwithstanding that the mud banks projected into the street?

A. That street was wide enough for two roads of vehicles easily.

Q. Just what do you mean by "peak hours"?

A. Well, peak hours, that is the time there is the most travel, in the evening when people come from work or in the morning when they go to work. We have two peak hours.

Q. And between what hours are they?

A. That varies on the different lines. In the uptown and laboring sections, the peak hours come earlier.

Q. What are the peak hours on the Gentilly line?

A. In the morning, it would come alone about 6:30 to approximately 8:30.

Q. And in the evening?

A. In the afternoon we have two peaks, which would run from about 4:30 to 6:00 or 6:30. Those are approximate periods.

Q. And the schedule durong those peak hours is three to three and a half minutes?

A. We always take the figures on the schedule I gave.

Q. And that schedule is always maintained during that particular hour?

[fol. 193] A. Yes, sir.

Q. Have you ever had any reports of delays on one or the other side of the viaduct?

A. No, sir; we get more delays on the narrow streets than anywhere else.

Q. If the cars were held $u\frac{1}{2}$ on one or the other side of that viaduct, necessarily that schedule could not be maintained?

A. No; in delays of that kind we get no report unless the cars were switched, but they might be a little late at the other end of the line and have a chance to make it up before they reach the other terminal; there is always a chance to make it up.

Q. In other words, if a street car was on the Gentilly side of the viaduct and had to lay there until the other car passed over the viaduct, which took that car about two minutes to cross the entire viaduct, the car that was coming in would necessarily be delayed that amount of time?

A. Sure, but you get greater delays right here in Royal street than you ever get down there.

Q. Would traffic move more freely if there was a double car track instead of a single car track?

A. No, sir.

Q. It would not move more freely?

A. No, sir.

Q. Notwithstanding the fact that cars can be delayed on one side or the other and be compelled to wait the other car to come over the viaduct?

A. It does not interfere with the schedule.

Q. And there has been no car held up on either side of the viaduct?

[fol. 194] A. I don't know; I cannot answer that.

Q. If there had been, you would know?

A. If I go through the records.

Q. Did you go through the records?

A. I don't get a report, unless it was necessary to switch a car, when a report is made.

Q. You went through the records to get this for information?

A. No, sir.

Q. Then, how did you get it?

A. By switching cars; for instance, when a car is switched, a report is made.

Q. Regarding the document Myers-1, where did you get that information?

A. May I see that, sir?

Q. Yes, sir (handing Myers-1 to witness); in other words, I asked you if you had gone through the records for that information?

A. Yes, sir; I though- you were talking about delays of cars. Those were taken off the trip sheets and the registers.

Q. Would the records show whether or not there had been a delay on cars held on one side of the viaduct?

A. Only—unless the car was late enough to be switched.

Q. Did you go thrsough the records to ascertain whether or not there had been reports of delays?

A. I did not.

Q. Then, you don't know whether there had been any delays?

A. No, sir.

Q. Do you know what increase, if any, there has been in the traffic on the Gentilly line since the years 1910 to the present date?

[fol. 195] A. All the records were destroyed during the fire and we cannot go back that far. We have no evidence now to show the figures on the lines now during those years.

Q. During the years 1919 to 1925 there was in increase?

A. As I remember those figures; I can identify them.

Q. (Showing witness document.)

A. Yes, sir; from 1919 to 1925 there was in increase.

Q. Then the decrease from 1926 to 1928 was something that applied generally on all street car lines?

A. Yes, sir; not only in New Orleans, but all over the country.

Q. In what manner did Commissioner Black order those rocks placed on the viaduct?

A. I believe it was by telephone message. You know the city owns all of the stuff out of the track area, and they gave us orders by phone where to place them, and I do know he ordered me to place those rocks under the viaduct.

Q. No official communication other than the telephone message from Mr. Black was received?

A. I don't think so.

Q. Do you know why he ordered them to be put there?

A. He told me he was going to crush those rocks and fill up some of the streets in that section.

Q. They were put there for ballast?

A. Ballast for what?

Q. To hold down the earth?

A. On the street?

Q. No; on the mud embankment of the viaduct?

A. No, sir; they belonged to the city and Mr. Black connected with Bacon and Davis purchased them.

Q. I thought they were purchased by F666B— and W—?

A. I sent them to the city, and I imagine they purchased [fol. 196] the- because they were removed.

Q. But you don't know whether they were purchased by F.666B666 & D—?

A. I certainly don't.

Q. How — had you been connected with the railways company?

A. Going on five years.

Q. When did you receive that telephone message from Mr. Black?

A. Well, we received a number of them, because in repairing or reconstructing streets there would be rocks come from out of streets and he would get in touch with us and tell us where he wanted that particular material placed, and I do know there were rocks on that viaduct before I came in.

Q. Do you know the width of the street at its nearest point on this photograph?

A. No, sir; I don't.

Q. And you don't know the width of the bridge on Myers-9?

A. No, sir; I measured neither one.

Q. But you do testify that it was nearer than the street?

A. The bridge?

Q. Yes, sir?

A. That is readily seen with the eye without measuring it.

Redirect examination:

By Mr. Kammer:

Q. Mr. Myers, in figuring the schedule of the Gentilly line, is not the delay necessary when one car is coming over the viaduct for the other car at the foot of it to wait until that car clears the viaduct; is that taken into consideration when making the schedule?

[fol. 197] A. Yes, sir; in making up any schedule you have to take the line, block by block, showing the number of people getting on and off, the time to go through, and from that data the schedule is made up.

Q. Now, those figures shown on Defendant-5 and Defendant-6, of the number of passengers carried and the revenue earnings, by years, those apply to the entire line, from the end of the line to the terminus on Canal street?

A. Yes, sir.

Q. It does not show any specific increase at the back end of the line?

A. No, sir.

[fol. 198] Mr. E. S. Myers, already duly sworn, was recalled and testified further as follows:

Direct examination.

By Mr. Kammer:

Q. Mr. Myers, the question was asked Mr. Guillot just now if he had or was furnished with a copy of his inspection in 1926—I will ask you that question?

A. We were not furnished with a copy of his detailed findings.

Cross-examination.

By Mr. Conkerton:

Q. You are not in possession of a copy?

A. I said we were not furnished with a copy.

Q. I asked you if you are in possession of a copy?

A. Never had one.

Q. You were in court the other day when Mr. Kammer quoted from a letter of 1926?

A. That was in connection with a letter by Mr. Hall with no detailed statement of his findings.

Q. Then the company had some knowledge from that communication of those findings?

A. We had knowledge, but you asked Mr. Guillot if he was in possession of a detailed report.

Q. I asked him, because I wanted to find out?

A. No, sir; we were not.

Q. Just now you said you received a communication from Mr. Hall as to some defect?

A. Yes, sir; that was brought out the other day.

[fols. 199-201] ADMISSION AS TO FRANCHISE

It is admitted that the New Orleans Public Service, Inc., the defendants herein, acquired the rights of the New Orleans Railways and Light Company in and to the franchise aforesaid by Special Master's deed, dated September 27, 1922, in the matter of the New York Trust Company vs. New Orleans Railways & Light Company, No. 60,593, In Equity, in the Eastern District Court of Louisiana.

[fol. 202] Mr. I. O. MALL, a witness for the defendant, having already been duly sworn, was recalled and testified further as follows:

Direct examination.

By Mr. Kammer:

Q. Mr. Mall, you testified when last on the stand about stress tests that you have made of piling, pile "C" designated by Mr. Godat as "Bent No. 1." I would like you to state a little more in detail just how that test was made?

A. The pile is the same one referred to by Mr. Godat as "Bent No. 1," the outside pile on the city side of the via-

duct. This pile was removed down to the ground level and replaced. The removed section of the pile was thoroughly examined and showed evidence of heart-rot; and continuing down for a depth of eight feet, with a view of learning what effect that deterioration had on the strength of the pile and to further learn what load would be required to cause stress checks in the remaining part of the pile we concluded to make this test: The pile was secured up at the top, requiring about two inches of material to be cut off at the top. [fol. 203] Then a section two feet long was cut off, which represented a part of the pile that had deteriorated the most. The pile was approximately 16 inches in diameter. We were unable to get the full length in the testing machine and we therefore split it into two as nearly equal parts as we could. These two parts were tested independently. One section required a load of 187,500 pounds to produce the first evidence of stress cracking, and the other section required a load of 192,500 pounds to produce the first evidence of stress cracking. Our testing machine was limited to 200,000 pounds capacity and we could not crush it, so we felt that the load it had to carry was positive proof that it was impossible to say that there was any stress checking in any of those piles in the viaduct.

Q. In testifying the other day you testified that the pile did not show evidence of cracking until you reached a pressure of approximately 375,000; by that you meant the test made of the two pieces together and adding them together?

A. That is right.

Q. In your opinion if that pile had been put in the machine as a whole, would it take a greater stress pressure to show the first evidence of stress checking?

A. It is logical that it would require a larger load to make it crack.

Q. Now, Mr. Moll, I then asked you what was the weight of a car such as was used on that viaduct loaded to its very maximum capacity—that is, every available inch of space crowded with people—and you stated two figures making [fol. 204] about 34 tons; and you also stated that a loaded car was at all times distributed over two bents in the viaduct, and you divided that 34 tons in half giving 17 tons to the bent; and then we took the bent which has three piles in it and divided the bent load of 17 tons by three, and you

said that each pile was compelled to carry a maximum load of 5⅔ tons, and expressed in pounds you stated 11,500 pounds. I then asked you if it did not take then approximately — times the amount of pressure to crack that pile, as shown by your test, and you stated that was correct. Do you still say that it was 12 times?

A. I do not. The figure you wanted would be obtained by dividing 385,000 pounds by 11,500 pounds, and that would give, approximately, 33 tons.

Cross-examination.

By Mr. Conkerton:

Q. Mr. Moll, — asked you or meant to ask you the other day whether or not any outside engineer had been employed to make an investigation of the viaduct?

A. You say you asked me that question?

Q. I thought I did.

A. I interpreted the question in reference to investigations to our own engineers, and I didn't understand you to mean that we had employed outside engineers to make an investigation or inspection.

Q. Well, were outside engineers employed?

A. Yes, sir.

Q. Who were they?

A. Professor Derickson was employed in December.

[fol. 205] Q. Professor Derickson is a recognized engineer?

A. He is; and since that time Mr. J. Frank Kohlman made an inspection.

Q. Would the fact that pile A of Bent No. 1 on the city side of the viaduct did not make contact with the cap alter your testimony any?

A. Not a bit.

Q. The fact that the cap does not make contact—does not that weaken the structure some?

A. Did you refer to lack of contact when there is no load on the viaduct, if so, the answer is there is no weight on that part of the viaduct.

Q. When the weight is not making contact, does it or not cause a swaying of the bent on the cap?

A. If there is sufficient vibration to *to* cause swaying, swaying will occur.

Q. If the opening at the cap were ¾ of an inch, would that cause any swaying?

A. Not appreciably.

Q. Would it cause any swaying?

A. It would.

Q. Would a street car in passing over that cap which did not make contact with the pile cause a loading on that pile?

A. The fact is that the tendency would be to decrease the load on that pile and increase the load on the central piles. You are referring to Bent No. 1?

Q. Correct.

A. And you stated the opening was ¾ of an inch?

Q. Correct.

A. It measures 3/16 of an inch; I have measured it.

Q. Then does it make contact when a car passes over it?

[fol. 206] A. No; due to the fact that there are iron straps fastened on the side of the pile and the side of the cap and the load is on the track which has no bearing on the top of the pile.

Q. On the opposite side of pile C it was not strapped?

A. No, sir.

Q. In what manner was it carrying the load?

A. In the regular manner; in accordance with the design.

Q. Was the pile proper making contact with the cap?

A. When we removed the pile it was evident that there was about three-quarters of the available area making contact on the under side of the cap.

Q. Was any shim used to make contact?

A. No; no shim was used.

Q. Well, pile C, according to your testimony showed material heart-rottening?

A. It did.

Q. Will you describe what you mean?

A. I have the area of that rotted portion measured accurately, and it was the equivalent of 10½ inches of heart-rot, meaning that 10½ inches of the heart was completely gone.

Q. And yet you did not consider that dangerous?

A. I did not.

[fol. 207] [Title omitted]

Testimony Taken on Behalf of plaintiff in rebuttal, on Tuesday January 22, 1929, beginning 11:00 o'clock a. m., in open court, before the Honorable E. K. Skinner, judge.

[fol. 208] Rebuttal Testimony on Behalf of Plaintiff

Mr. David W. Godat, a witness for the plaintiff, having already been duly sworn, was recalled and testified in rebuttal as follows:

Direct examination:

By Mr. Conkerton:

Q. Mr. Godat, I show you a pencil sketch, marked Godat-1, and ask you if you made that sketch?

A. I did.

Q. From what was that sketch made?

A. From the field report made by Mr. Weiler and Mr. Booksch (phonetically).

Q. As to Bent No. 1, will you tell us just what that sketch shows?

Mr. Kammer: Unless it *to* rebut the testimony of Mr. Moll and Mr. Guillot, or something else brought out in the testimony of defendant, we object to the testimony.

The Court: The objection will go to the effect; I don't know yet what it will be.

A. The sketch indicates, first of all, that pile A on the uptown side does not make contact by more than 3/4 of an inch with the cap. Our inspection also shows that the total deflection of structure does not make contact by more than a quarter of an inch, or a total deflection of a half an inch. It shows that the pile is strapped by two pieces of 12" x 12" iron 3-4 of an inch thick, 3½ feet wide by 2 feet long. The iron strap is bolted to the pile cap and to the pile, two [fol. 209] boards in each member. It further shows that pile B makes contact over half of its area. It shows that pile C on the lower side does not make contact with the under side of the cap by more than 1½ inches. It shows further that this pile has rotted until 1½ inc-es of piling remains, and the extent of the rot is approximately six feet

in depth, that is, six feet long; that pile C has a crack which extends down possibly 10 inches, de-troying the continuity of the pile itself.

Q. What effect would a street car passing overhead have?

A. In Mr. Moll's testimony he testified that a load was transmitted to pile A through the three-quarter inch straps. I contest that evidence, for the reason that the two three-quarer inch bolts were not capable of transmitting the load of a street car on to that particular pile, the area of the bolt being only 3/4's of an inch in diameter. With respect to pilo C, the bent was considered dangerous, not only on account of the contact during the passage of a car but on account of a lack of continuity of the remaining portion of the shell of the pile. His testimony is similar to that I expressed the other day, hacing reference to a cast iron column that as long as the continuity remained *remained* the pile would be capable of carrying a much greater load than if broken.

Q. Have you finished with No. 1?

A. Yes, sir.

Q. Tell us about bent No; 2?

A. That is similar to bent No. 1, with the exception, to the effect that the strap is a single 12″ x 12″ instead of a double one, as stated by Mr. Moll, and that was the element [fol. 210] that constituted the danger. Our findings show that there was an approximate heart-rot in the cap for a depth of four inches from the top surface down, which rot extends between the faces of the inside street car track stringers; the wood, however, beneath the stringers was sound. This brings out the fact that approximately 1/3 of the cap is rotted, and it is rotted from the top surface down, the top surface being the surface carrying portion.

Q. Just what do you mean by material heart-rottening?

A. Material hear--rottening with respect to a pile.

Q. With respect to a pile?

A. In my report material heart-rottening was designated, that means the heart-rottening which lies beneath the cap proper in excess of six inches.

Q. Does the material heart-rottening in both piles B and C in the 4th pile bent constitute a dangerous bent?

A. It does.

Q. Does the material heart-rot in A and B or B and C of a 3-pile bent constitute a dangerous bent?

A. It does; it leaves only one pile in a three-pile bent, and that an outside bent, to carry your load, and our report was based on the fact that a greater hear--rot than six inches diameter in a pile would make the bent dangerous.

Q. Did you find such condition existing from your examination?

A. I did in quite a number of bents.

Q. Do you know to what extent or how great has been the recent repairs made to the viaduct?

A. My recent examination shows that there was very little done to correct one or two features which were con-
[fol. 211] sidered extremely dangerous in the 1926 report.

Q. Do you know what present work is being done upon the viaduct?

A. I have not been to the top of the viaduct for the past two weeks, but from the piles of material which have been delivered and from the indications of the work started, I should say that considerable work is contemplated by the New Orleans Public Service.

Q. I show you a sketch marked Godat-2, and ask you if you are familiar with the signature of Mr. Val Spearing on that sketck ?

A. I am.

Q. Is there anything else to your knowledge which would render the viaduct unfit for use or unsafe?

A. There are a number of cases which were enumerated in my former testimony, the principal of which is, as I recall it, was bent No. 13, which is a 4-pile bent. If you don't mind, may I see my report (Counsel hands witness the document requested). This particular bent, the piles are in a satisfactory condition; however, the cap is completely rotted in the center from the top down; and the riverside surface inward to such an extent that during the passage of a car if a person's hand is held on the face of the cap the cap is inclined to burn it; and after determining that we ascertained the amount of heart-rot by probes and the probes showed that 4½ inches of it was soft material. That rot extends the entire width, or length of the cap between stringers. I should like to call attention to bent No. 8 on the riverside. It is a four-pile bent woth a single 12″ x 12″ strap (or cap), and this 12″ x 12″ sub-cap over piles B and C. Piles B and C are hollow in the center, nothing re-

[fol. 212] maining but a shell from 1½ to 2 inches in thickness. Pile D of the same bent has the heart practically completely gone for a depth of 1½ feet below the undersurface of the cap. The cap over pile D is rotted to the extent 1½ to 2 inches from the top surface down, particularly adjacent to the river pile.

Mr. Kammer: That is testimony that should have been brought out in chief.

The Court: It seems to me to be a repetition.

Mr. Kammer: I ask that the testimony be stricken from the record?

The Court: Declined.

A. I would like to say that that is not original testimony. My original testimony said that certain bents were dangerous, and at Mr. Conkerton's suggestion I simply stated the reason why I said they were dangerous.

Mr. Kammer: That is a question for your attorney and not for you.

Mr. Conkerton, continued:

Q. Will you tell us what is the width of Franklin Avenue as shown on that sketch on the lowerside?

Mr. Kammer: Objected to, unless it is shown as at the present time, and not to show that it was not constructed in accordance with the plans and specifications.

[fol. 213] The Court: The objection is overruled.

A. On the lower side the width of the street is 24 feet at Agriculture street, and it narrows down on account of the fill until it is 18 feet on Industry street.

Mr. Conkerton, continuing?

Q. What is the width, as shown on the sketch, at Dorgenois street? At the curb line of the neutral ground?

A. The width shown on the sketch if 28 feet.

Exhibits—Godat-1 & Godat-2

Counsel for plaintiff offers, produces and files in evidence the blueprint marked Godat-2 and the pencil sketch marked Godat-1.

Cross-examination.

By Mr. Kammer:

Q. Mr. Godat, speaking of the fact that in bent No. 1 on the city side, you state that the cap does not make full contact with the top of the pile; is not that a mere detail that could be corrected by a shim?

A. It can, but it is not; and shims are not considered good practice.

Q. Would not a shim do the work?

A. It probably would.

Q. Now, you also testified that pile A did not make any contact, and I ask you that since the load of a car did not produce an equal bearing on all of those piles, the bent does not show that the remaining piles were equal to carry any load that they might get?

A. It does not. A large portion of the load is carried away from that bent during the continuity of the track [fol. 214] proper.

Q. That is, from that I understand you to say that if a large portion of the weight is carried by the continuity of the stringers and track structure that it does not make any material difference whether the cap makes contact or not, insofar as the safety of the viaduct is concerned?

A. It does. Continuity is a factor of safety, which means good design.

Q. Is it not a factor of safety to have the structure designed to carry a greater weight than it is actually required to carry?

A. It is.

Q. Is not that a fact in this case?

A. It is in some conditions.

Q. I am speaking of the viaduct as a whole?

A. The viaduct is, I consider, as safe as it is at its weakest point, and as pile A and bent No. 1 have been practically eliminated, you have be- carrying capacity through those piles.

Q. Well, you stated the other day that with that particular bent the load of a car was safely carried by the bents on each side thereof, did you not?

A. I said a portion of the load was transmitted to each of the posts adjacent.

Q. And that they safely carried the load?

A. Not necessarily with safety.

Q. You don't think that there is a possibility of immediate danger there, do you?

A. I do.

Q. From what cause or reason?

[fol. 215] A. If you are relying on a structure that is bolted together with efficient parts in order to support which is liable to be carried by stringers or pile bents, you are taking chances which should not be taken by engineers.

Q. And don't you use stringers and track structures carrying across a distance even greater than the three bents in that structure?

A. I beg your pardon?

Q. I say, is not it good design to use a span of stringers and track structure over a wider distance than between three of those bents, eliminating a center bent?

A. If you mean that we could eliminate any one of the bents and allow that same size stringer to exist, I would consider it a dangerous condition.

Q. Notwithstanding the fact that you have 14 stringers on that structure?

A. I contested that before; I said that there should be two on each side or four to the bent.

Q. Together with the guard rail?

A. I don't think it good practice to consider the guard rail an aid in carrying the load.

Q. You stated that it did have some power in carrying the load?

A. I did, but it is not good practice.

Q. Well, where there is a span equal to the distance between two outside bents, you could eliminate the inside bent?

A. I don't think you could.

Q. You would not find that anywhere?

A. Not when the load that traverses it is by viaduct. Every 16 feet on centers, it would be 32 feet, but the deflection would be too great where the travel is cars of the Public Service, and differential trains.

Q. What do you mean by differential trains?

[fols. 216-219] A. Trains which carry shells, concrete and rails, which are heavier than the load carried by the passenger cars.

Q. Do you know what the capacity would be on such cars?
A. I consider the operation of street cars over that viaduct dangerous; therefore, it would be unnecessary to compute the heavier loads.
Q. Do you know, approximately, what it would be?
A. I do not.

[fol. 220] IN SUPREME COURT OF LOUISIANA

No. 29873

CITY OF NEW ORLEANS

v.

NEW ORLEANS PUBLIC SERVICE, INC.

Appeal from the Civil District Court, Parish of Orleans, E. K. Skinner, Judge

OPINION AND DECREE--May 20, 1929

OVERTON, J.:

This is a suit to force defendant to demolish a viaduct, owned and used by it for the passage of its street cars at the intersection of Franklin Avenue and Florida Walk, over the tracks of the Southern Railway Company, and to require it to construct at that point, along Franklin Avenue, at grade, a double line of tracks, to take the place of the single track, built on the viaduct.

The viaduct was built for the purpose of avoiding crossing, at grade, the tracks, now used by the Southern Railway Company. The grounds chiefly relied on for the demolition of the viaduct are, first, that it was not constructed in accordance with the ordinance authorizing or directing its construction, secondly, that as constructed it permits of the laying of but one railroad track on it, which is insufficient for the present needs of the people in the part of the city, served by the railway line, crossing it; and, thirdly, that by reason of decay and the failure to keep it in proper repair, the viaduct has become dangerous and unsafe.

The defense is a denial that the viaduct was not constructed as directed; a denial that one railway track, at that point, is insufficient for the needs of that section of the city; a denial that the viaduct is unsafe; a plea that, to require defendant to cross the Southern Railway tracks at grade would introduce a grave hazard, which the viaduct, since its construction, has eliminated; and that to require the [fol. 221] demolition of the viaduct would be to deprive defendant of its property without due process of law, in violation of the federal and state constitutions, and to impair defendant's contract rights with the city, in violation of Section 10 of Article 1 of the Constitution of the United States, and of Section 15 of Article 4 of the Constitution of this state, and a denial to defendant of the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The viaduct, with the exception of the approaches, was constructed in 1910, under the authority of Ordinance No. 6445, New Council Series, adopted in that year, which directed that the viaduct be so constructed as to embrace earthen embankment approaches of such height and width as not to exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways thereon. The embankments for the approaches, leading up to the viaduct, were constructed in 1914. In 1926, petitions were addressed to the Commission Council of the City of New Orleans, asking, for various reasons, that the viaduct be demolished. The council caused an investigation to be made to ascertain the condition of the structure. Two examinations were made to determine its condition. The report made to the council indicated that the viaduct was becoming unsafe, though not so much so as to require the immediate cessation of traffic over it. As a result of the report, the council passed Ordinance No. 9709, Commission Council Series, on November 17, 1926, ordering defendant to remove the viaduct, and ordering it to construct, operate and maintain a double line of tracks for the operation of its cars, at street level, along Franklin Avenue and across Florida Walk, the tracks to be constructed in accordance with plans and specifications to be prepared by defendant, and approved by the Commissioner of Public Utilities and the City Engineer of New Orleans, the removal of the viaduct to be completed within one year after the passage of the ordinance. The year

elapsed with no effort on the part of defendant to comply with the council's order. This suit is virtually an effort to enforce compliance with the ordinance.

[fol. 222] The viaduct is of trestle construction, or in other words, the track structure is built on piles. The first inspection, made at the instance of the council, showed that the viaduct was in an unsafe condition, primarily on account of the condition of the bents, that is, the supporting structures, which support the stringers and the track structure itself. At this inspection it appeared that the condition of the bents varied considerably. Some were in a satisfactory condition, while others, which supported the spans, were considerably rotted, and in others, the piling that supported the caps, and in turn the track structure, had become rotten to such an extent as to leave nothing but a shell of the former piling. As to the foundation on the river side the earth had subsided from the base of the pier to such a degree as to expose at least two or three rows of the piling that supported it. The front row of the piling had twelve piles, and of these, five had so rotted as to make them dangerous. As to the second and third rows, the engineer making the inspection, was unable, due to conditions, to inspect them, but felt that, as the piles there were exposed to the puddling action of rain water, which might seep under and not drain away, as was the case with the piling in the first row, that the same condition existed there as in the first.

Not many days later, though after the ordinance condemning the viaduct had been passed, a second inspection was made. It was then found that the conditions existing at the first inspection had been somewhat improved by defendant, by reason of the removal, at its instance, of certain of the bents considered dangerous at the first inspection, but it was found that other bents were still in a dangerous condition. The work of replacement was found to be satisfactorily done, save in two instances, where the replaced piling failed to make proper contact, but in those instances, the defective work had but little effect on the strength of the bridge. At this inspection ten bents on the riverside of the structure were found to be unsafe, and six on the Gentilly side, making a total of sixteen.

While the evidence offered by the defense shows that [fol. 223] some of the piling was decayed, yet the tendency

of the evidence offered by it is to the effect that the structure at no time was in a dangerous condition, notwithstanding it had been weakened by decay.

Our conclusion is that the evidence does not justify as in holding that the structure may be properly regarded as safe, but to the contrary, it should be regarded as unsafe, notwithstanding the repairs that have been made, although it is unlikely that there is immediate danger of a collapse.

The contention that the viaduct was not constructed according to the ordinance, authorizing or directing its construction, is based upon the contention that it is so built as to narrow the roadway by encroaching upon it, whereas the ordinance provides that the structure must be built approximately on the center line of Franklin Avenue, and so as not to exceed the neutral ground, nor obstruct the roadways on that avenue. The evidence shows that on the river side of the structure the construction is such as to maintain the correct width between curves, that is to say, a width of twenty-eight feet, but that at one point at the terminus of one of the embankments, the roadway has been narrowed from twenty-eight to eighteen feet. It is not unlikely, however, that this condition is due, not to improper construction by defendant, but to a taking by plaintiff of twelve feet of the roadway for a sidewalk, about the time that the roadway was paved. Granting this to be the case, it does not follow, however, that plaintiff is not entitled to regulate the right granted to cross Florida Walk, so as to obtain, if necessary, the required width for the roadway.

The contention that the viaduct should be removed, because it is so constructed as to admit of but one railway track on it, when there should be two over it, to serve properly that section of the city, served by the railway, crossing the viaduct, is scarcely sufficiently supported by the evidence to justify, of itself, the removal of the viaduct. The population of that section of the city, served by the railway line, has unquestionably considerably increased since the construction of the viaduct in 1910, and probably will continue to increase, but it does not appear to us that it has yet so [fol. 224] increased as to call for the removal of the structure in order to provide for double tracks, though this may become necessary at some time in the future.

Plaintiff has power under its charter to open and keep open and free from obstruction its streets, and to authorize

the use of them for railroads operated by horse, electricity, steam or other motive power, and to regulate the same. Sub. Sec. 3 of Sec. 4 of Act 159 of 1912; Sub. Sec. 12 of Sec. 1 of Act 93 of 1921. Plaintiff unquestionably has ample police power for the discharge of its functions, "including the power to enact and enforce all ordinances necessary for the protection of the lives and property for the preservation of the health, and for the promotion of the comfort, convenience, and general welfare of its inhabitants, and including, specifically, the power to regulate the use of the streets and to maintain them in a safe condition." City of New Orleans v. LeBlanc, 139 La. 113, 119, 71 So. 248.

We feel from the evidence before us that the viaduct, due to decay, is not in a condition, notwithstanding the repairs made, that should be regarded as safe. Such being the case it is obvious that something should be done to correct the situation. The Commission Council reached the conclusion that the viaduct should be removed and grade crossings constructed in its place, consisting of double tracks. The council evidently did not consider that repairs would solve the problem. We are not prepared to say that the council, which is intrusted, within reasonable limits, with power to determine what should be done, has erred in ordering the removal of the structure, but think that the evidence justifies the action of that body. The viaduct has been there a number of years. The evidence of the City Engineer leads to the conclusion that, if repairs were undertaken, they would have to be substantial repairs, and rather extensive. If repairs were undertaken and proved to be adequate, they would doubtless result in leaving the roadway narrowed at the point indicated above, when the city should be in position to increase the roadway there to its proper width. Moreover, if the repairs proved to be adequate, they would perpetuate a viaduct, which is admittedly capable, due to its width, of accommodating only one rail-[fols. 225 & 226] way track, when sooner or later, in all likelihood, another will be required. The city has power, under the facts of the case, to cause the demolition of the viaduct. Its action, in so directing, is not an unreasonable exercise of the police power. In changing the crossing from an overhead to a grade crossing, it is fair to assume that the city will see that proper precautions will be taken to avoid acci-

dents. By ordering the change made the city is not depriving defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, nor of Section 2 of Article 1, of the Constitution of this state, nor is the city impairing the obligation of defendant's contract with it, in violation of the Constitution of this state and of the United States, for by ordering the removal defendant is legitimately exercising its police power, subject to which defendant holds its franchise. Chicago & Alton Railway Company v. Trambarger, 238 U. S. 67, 59 L. Ed. 1204; City of Shreveport v. Kansas City, S. & G. Ry. Co., 167 La. —, 120 So. 290.

For these reasons, the judgment appealed from is affirmed.

O'Niell, C. J., absent, takes no part.

[fol. 227] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER DENYING REHEARING—June 17, 1929

It is ordered that the rehearing applied for in this case be refused.

[fol. 228] IN SUPREME COURT OF LOUISIANA

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed Aug. 27, 1929

Petition for Appeal

Considering itself aggrieved by the final decision of the Supreme Court of the State of Louisiana in the above entitled cause, the defendant therein, New Orleans Public Service Inc., hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond therein.

Assignment of Errors

The said New Orleans Public Service Inc. assigns the following errors in the record and proceedings in the said case, wherein the Supreme Court of the State of Louisiana erred:

I

In holding that Ordinance No. 9375, Commission Council Series, requiring defendant to demolish the viaduct which the City of New Orleans itself ordered should be built, and requiring defendant to establish a grade crossing, was a legitimate and proper exercise of the police power of the City of New Orleans, and was not violative of the Fourteenth Amendment, Section 1, of the Constitution of the United States, as depriving defendant of its property without due process of law.

II

In holding that Ordinance No. 9375, Commission Council [fol. 229] Series, requiring the demolition and removal of the viaduct was not an impairment of the obligations of defendant's contract rights with the City of New Orleans and was not violative of Section 10 of Article I of the Constitution of the United States.

For which errors the defendant, New Orleans Public Service Inc., prays that the said judgment of the Supreme Court of Louisiana, dated May 20th, 1929, in the above entitled cause, be reversed and a judgment rendered in favor of the said defendant; and for costs.

Charles Rosen, Alfred C. Kammer, Dufour, Rosen & Kammer, Counsel for Appellant.

[File endorsement omitted.]

[fols. 230-232] In Supreme Court of Louisiana

[Title omitted]

Order Allowing Appeal—Filed Aug. 27, 1929

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme

Court of the United States, from the judgment made and entered in the above entitled suit by the Supreme Court of Louisiana, on the 20th day of May, 1929, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States, in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of Louisiana, in the above entitled cause, as provided by law; and it is further ordered that the Clerk of the Supreme Court of the State of Louisiana shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 30 days of this date; and

It is further ordered that security for costs on appeal be fixed in the sum of $1,000.00.

New Orleans, La., August 27, 1929.

Charles A. O'Niell, Chief Jutsice of the Supreme Court of the State of Louisiana.

Service of the foregoing petition and order for appeal hereby accepted, and formal issuance of citation waived,

Bertrand I. Cahn, Attorney for the City of New Orleans, Appellee.

[fols. 233-238] In Supreme Court of Louisiana

[Title omitted]

Order Extending Time

On motion of New Orleans Public Service, Inc., through their attorneys, Dufour, Rosen & Kammer, and

On suggesting to the Court that an appeal was allowed to the Supreme Court of the United States from the Supreme Court of Louisiana in the above entitled cause and that it was further ordered that the Clerk of the Supreme

Court of Louisiana prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States within thirty (30) days from August 27th, 1929, and

On further suggesting that mover desires further time within which to complete said transcript;

It is ordered by the Court that an extension of thirty days from September 26th, 1929, be granted in which to prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States.

New Orleans, La., September 23rd, 1929.

(Signed) Charles A. O'Niell, Chief Justice of the Supreme Court of the State of Louisiana.

[File endorsement omitted.]

[fol. 239] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed Oct. 25, 1929

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

The Supreme Court of Louisiana erred:

Point 1. In holding that Ordinance No. 9375, Commission Council Series, requiring defendant to demolish the viaduct which the City of New Orleans itself ordered should be built, and requiring defendant to establish a grade crossing, was a legitimate and proper exercise of the police power of the City of New Orleans, and was not violative of the Fourteenth Amendment, Section 1, of the Constitution of the United States, as depriving defendant of its property without due process of law.

Point 2. In holding that Ordinance No. 9375, Commission Council Series, requiring the demolition and removal of the viaduct was not an impairment of the obligations of defendant's contract rights with the City of New Orleans and was

not violative of Section 10 of Article I of the Constitution of the United States.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

[fol. 240]	Title of paper	Record page
Petition		1-8
Ordinance	#6445 N. C. S	18 (of Defendant's Exhibits)
"	#9375 C. C. S	8-a & 8-b
Answer		9-14
Franchise		13 (of Defendant's Exhibits)
Testimony of	David W. Godat	19-47
"	" Albert G. Wyler	52-54
"	" A. M. Schneider	54-63
"	" John Buttone	63-72
"	" Geo. J. Dinkel	72-75
"	" John Trascher	75-79
"	" Frank Krass, Jr	80-83
"	" E. Guedon	83-94
"	" Walter Miester	94-109
"	" William Niehues, Jr	112-117
"	" L. J. Darrah	118-122
"	" Henry McCabe	122-130
"	" W. F. Loan	130-134
"	" Paul C. W. Jensen	135-145
"	" Cornelius Hoolahan	145-152
"	" Dudley C. O'Dowd	152-156
"	" I. O. Mall	158-178
"	" Albert H. Guillot	179-182
"	" E. S. Myers	183-198
"	" I. O. Mall	202-206
"	" David W. Godat	208-216
Admission		199
Judgment		15-16
Motion of appeal and order		17
Opinion and decree		220-225
Order denying rehearing		227
Petition for appeal, assignment of errors, and prayer for reversal		228-229

Title of paper — Record page

Order allowing appeal.....230
Motion and order for extension of time to file transcript.....233
This statement and designation.....
Charles Rosen, Alfred C. Kammer, Dufour, Rosen & Kammer, Counsel for Appellant.

[fol. 241] UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans,
City of New Orleans, ss:

Before me, the undersigned authority and Notary Public in and for the Parish of Orleans, State of Louisiana, residing therein, duly commissioned and qualified, personally came and appeared Charles Rosen, to me well known, who did depose and say:

He is counsel for the appellant, New Orleans Public Service, Inc., and that on Saturday, October 19th, 1929, he made service upon the counsel for appellee, Bertrand I. Cahn and William F. Conkerton, of the accompanying statement of points to be relied upon and designation of the parts of the record to be printed, in the following manner:

By depositing in the United States mail, a copy of said statement of points to be relied upon and designation of the parts of the record to be printed, postage prepaid, to Bertrand I. Cahn and William F. Conkerton, Counsel for Appellee, City Hall, New Orleans, La., the same being the location of their office and their known address.

Charles Rosen.

Sworn to and subscribed before me this 19th day of October, 1929. Dufour Bayle, Notary Public. (Seal of Dufour Bayle, Notary Public, Parish of Orleans, La.)

[fol. 242] [File endorsement omitted.]

Endorsed on cover: File No. 34,591. Louisiana Supreme Court. Term No. 460. New Orleans Public Service Incorporated, appellant, vs. City of New Orleans. Filed October 25, 1929. File No. 34,591.

FILE COPY

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CHARLES ELMORE C
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

versus

NEW ORLEANS PUBLIC SERVICE INC.,
Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

STATEMENT AS TO JURISDICTION ON APPEAL.

CHARLES ROSEN,
ALFRED C. KAMMER,
Counsel for Appellant.

MONTGOMERY-ANDREE PRINTING CO. INC., 420-432 CHARTRES, N.O.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

versus

NEW ORLEANS PUBLIC SERVICE INC.,
Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat., 936 (United States Code, Title 28, Section 344),

provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.
>
> "(b) It shall be competent for the Supreme Court by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the

Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for *certiorari*, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for *certiorari* and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: Provided, That where in such a case there appears to be no reasonable ground for granting a petition for *certiorari* it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double cost, as provided in section 1010 of the Revised Statutes."

By Act of Congress of January 31, 1928, Chapter 14, 45 Stat., 54, it is provided:

"That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

And by Act of April 26, 1928, Chapter 440, 45 Stat., 466, amending Section 2, of the Act January 31, 1928, it is provided:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be

had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on the 20th day of May, 1929 (R. p. 220). Rehearing denied June 17, 1929 (R. p. 227).*

The application for appeal was presented on the 27th day of August, 1929 (R. p. 228). The order allowing appeal was granted August 27, 1929 (R. p. 230), and the order extending the time to file the transcript was allowed September 23, 1929, extending the time for thirty days from September 26, 1929. (R. p. 233).

C.

NATURE OF CASE AND RULING BELOW.

(a) **Nature of the Case.** On July 27, 1909, the Council of the City of New Orleans adopted Ordinance No. 6032, New Council Series, directing the Comptroller of the City to advertise for sale and to sell at public auction a franchise, right of way and right to construct, maintain

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*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Louisiana and on file with the Clerk of this Court. The record has not yet been printed.

and operate a line of street railway, i. e., a double track street railway beginning on Lafayette Avenue at the corner of Villere Street, and extending on Lafayette Avenue to the intersection of Franklin Avenue, thence along Franklin Avenue to the intersection of St. James Avenue (see copy of Ordinance, 12 of defendant's exhibits).

On December 17, 1909, by act before Robert Legier, Notary Public (13 of defendant's exhibits), the City of New Orleans, pursuant to public adjudication by the aforesaid Comptroller and pursuant to the provisions of said Ordinance No. 6032, N. C. S., granted to New Orleans Railway & Light Company a franchise for a street railway from Lafayette Avenue and Villere Street to Franklin Avenue and St. James Avenue, in accordance with the provisions of the aforesaid ordinance, which is copied *in extenso* in said notarial act, and which contains paragraph (x) of Section 2 of said ordinance, which reads as follows:

> "The purchaser is obligated herein to construct and operate the railway provided for herein within twelve (12) months after the signing of the contract provided for, and to this end, at least one track with the necessary curves, switches, etc., shall be completed at that time, but the construction of the remainder need not be completed until such time as the purchaser may deem necessary."

Before said line of street railway was constructed on Franklin Avenue, the New Orleans Terminal Company objected to the New Orleans Railway & Light Company crossing its railroad tracks at grade on Franklin Avenue at the intersection of Florida Walk.

The City of New Orleans, being of opinion that the general public interest would be best subserved by the tracks of the New Orleans Railway & Light Company not crossing at grade, but that the said tracks should cross the tracks of the railroad company on a viaduct, and the Railway Company, being satisfied to build such a viaduct, the Council of the City of New Orleans, on March 8, 1910, adopted Ordinance No. 6445, N. C. S. (18 of defendant's exhibits), which directed and required the Railway Company to construct, subject to the approval of the City Engineer, a viaduct

> "approximately on the center line of Franklin Avenue at and in the vicinity of the Florida Walk intersection, the said viaduct to embrace earthen embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue nor obstruct the roadways on said Avenue."

The viaduct was constructed in 1910 and thereafter, in February of 1914, W. J. Hardee, then City Engineer, and Hon. E. E. Lafaye, then Commissioner of Public Property, approved a plan of the Railway Company for the earthen embankment or fill on said viaduct and said earthen embankment or fill was constructed. (See Plan, 1 of defendant's exhibits). The viaduct, since its erection in 1910, has been and still is in operation.

Thereafter, New Orleans Public Service Inc., appellant herein, acquired the rights of the New Orleans Railway & Light Company in and to the franchise aforesaid by Special Master's deed dated September 27, 1922, in the matter of *New York Trust Company v. New Orleans Rail-*

way & Light Company, No. 16,953 in Equity, United States District Court for the Eastern District of Louisiana (see Admission, R. p. 199).

On November 16, 1926, the Commission Council of the City of New Orleans adopted Ordinance No. 9375, C. C. S. (R. pp. 8-a and 8-b), ordering appellant to forthwith remove the viaduct; to construct, operate and maintain a double line of tracks for the operation of its cars at street level along Franklin Avenue, and that the work of dismantling and removing said viaduct should be completed within one year after the passage of said ordinance.

Appellant refused to comply with said ordinance and the City of New Orleans instituted suit. (See Petition, R. p. 1). Defendant filed answer (R. p. 9) averring, among other things, that New Orleans Railway & Light Company, the grantee and predecessor in title to defendant of the franchise to operate said street railway line on Franklin Avenue, was, by Ordinance No. 6445, N. C. S., directed and required by the City Council in 1910, in the interest of public safety, to construct said viaduct; that the said viaduct was constructed at a cost of approximately $58,000.00; that it had ever since been maintained and operated with due regard of safety by the New Orleans Railway & Light Company and by defendant as its successor, and it has proved entirely adequate and sufficient for the transportation of the users of said line; that the viaduct was required to be built over the tracks of the Southern Railway Company (New Orleans Terminal Co.) because at that point said grade crossing was dangerous, by reason of the fact that there are eight steam railroad tracks almost continually used by said Southern Railway and

other companies for the switching and operation of trains and cars during the day and the night and that said viaduct was not required to be extended across the railroad tracks of the L. & N. Railroad, by reason of the fact that there was and is no such almost continuous switching operation of trains and cars there as was and is at said Southern Railway crossing; that the viaduct has at all times been kept in a safe condition, has not been allowed to deteriorate, has been operated with safety, and that it has been entirely adequate for the needs of the public of that vicinity, which is substantially the same as it was when the viaduct was built; that there is no need whatever now to require the destruction of said viaduct and to require defendant to cross eight tracks of the Southern Railway Company at grade crossing, which would not only be a needless expense involving a cost in excess of $135,000.00, besides the loss of the money already expended by defendant's predecessor, as aforesaid, but would subject the defendant and the users of said street railway line to the very hazards and dangers of grade crossing accidents which the viaduct was intended to and does eliminate; that there is now and was no justification for the passage of Ordinance 9375, C. C. S., requiring the demolition of the viaduct, and that defendant should rebuild its tracks across the Southern Railway Company tracks at grade and that the passage of said ordinance was unjust, arbitrary and oppressive; that it was not a legitimate exercise of the police power of the City and not required by any consideration of safety to the public; on the contrary, the demolition of the viaduct and the requiring of defendant to cross said Southern Railway Company tracks at grade would introduce the grave hazards and dangers which the viaduct has all these years eliminated;

that Ordinance 9375, C. C. S., was passed not in the interest of public safety, but in order to satisfy certain property owners who consider that their property is being damaged by the presence of said viaduct, and for no other adequate reason; that defendant's predecessor was required by the City to build said viaduct originally at a heavy cost in order to obviate the dangers of a grade crossing, and now to require defendant to demolish the viaduct which the City itself ordered should be built and to establish the grade crossing aforesaid is not a legitimate and proper exercise of the police power of the City, but an arbitrary exercise of its power and utterly illegal and a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article 1 of the Constitution of the United States.

On the trial of the case, without any written reasons, the District Court rendered judgment (R. p. 15) in favor of the City, in accordance with the prayer of the petition. On appeal therefrom, this judgment was affirmed by the highest court of the State of Louisiana, the Louisiana Supreme Court, in which a decision of the suit could be had (Louisiana Constitution of 1921, Art. VII, Sec. 10) (R. p. 220); from which this appeal is taken (R. p. 228).

The pertinent grounds of attack levelled against Ordinance No. 9375, Commission Council Series, of the City of New Orleans are:

(a) That the provisions of said ordinance, requiring the defendant to demolish the viaduct

which the City of New Orleans ordered should be built, and requiring defendant to establish a grade crossing, was not a legitimate and proper exercise of the police power and was violative of the Fourteenth Amendment, Section 1, of the Constitution of the United States, as depriving defendant of its property without due process of law.

(b) That said ordinance requiring the demolition and removal of the viaduct was an impairment of the obligations of defendant's contract rights with the City of New Orleans and was violative of Section 10 of Article 1 of the Constitution of the United States (R. pp. 12, 13 and 14).

These grounds of attack are set up at each and every step and more specifically (1) in the original answer (R. pp. 9-14); (2) on application for rehearing (R. p. 226), and (3) in assignment of errors filed on allowance of this appeal (R. pp. 228-229).

(b) **Ruling Below.** The opinion (R. pp. 220-225) concedes that the Federal constitutional question was before the Louisiana Supreme Court (R. pp. 220-225); that its determination was essential to the decision upholding the validity of Ordinance No. 9375, C. C. S., and the Court proceeded to determine and did determine that question adversely to appellant. (R. p. 225).

The case of *Chicago & Alton Ry. Co. v. Tranbarger, 238 U. S. 67 (59 L. Ed. 1205)*, is cited by the Louisiana Supreme Court as authority for its ruling (R. p. 225).

Since the ruling is not supported by the case cited, nor foreclosed by any prior decisions of this Court, nor by the facts, there is here a substantial Federal constitutional question requiring review by appeal as of right.

(c) **Cases Believed to Sustain Jurisdiction.** The following decisions of this Court are believed to sustain jurisdiction of this appeal:

King Mfg. Co. v. Augusta, 277 U. S., 100.
Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135.
Whitney v. California, 274 U. S., 357, 362.
Fiske v. Kansas, 274 U. S., 380, 385, 386.
Bluefield Co. v. Pub. Ser. Comm., 262 U. S., 679, 683.
Zucht v. King, 260 U. S., 174, 176.
La. Ry. & Nav. Co. v. New Orleans, 235 U. S., 164.
Reinman v. Little Rock, 237 U. S., 171, 176.
North Carolina R. Co. v. Zachary, 232 U. S., 248, 257.
Atlantic Coast Line v. Goldsboro, 232 U. S., 548.
Owensboro v. Cumberland Telephone Co., 230 U. S., 58.
Grand Trunk Western Ry. v. South Bend, 227 U. S., 544.
Illinois Central Railroad v. Chicago, 176 U. S., 646.

We submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

CHARLES ROSEN,
ALFRED C. KAMMER,
Counsel for Appellant.

FILE COPY

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

Brief for Appellant, New Orleans Public Service Inc.

CHARLES ROSEN,
ALFRED CHARLES KAMMER,
Attorneys for New Orleans Public Service Inc., Defendant and Appellant.

MONTGOMERY-KINGSBURY PRINTING CO. INC., 420-422 CHARTRES, N.O.

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IN THE

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OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

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NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

Brief for Appellant, New Orleans Public Service Inc.

I.

The opinion in the Supreme Court of Louisiana is reported in *City of New Orleans v. New Orleans Public Service Inc., 168 Louisiana Reports 984, (123 Southern Reporter 648).*

II.

Paragraph I of Rule 12, having been complied with, reference is made to the printed statement as to jurisdiction on appeal.

Inasmuch, however, as Appellee has filed a statement against the jurisdiction asserted by us and this Honorable Court, as we have been advised by the Clerk thereof, has postponed further consideration of the question of jurisdiction to hearing on the merits, it may not be amiss to enlarge on this question.

The statutory provision sustaining the jurisdiction of the Court herein is fully set out in our printed statement as to jurisdiction on appeal and we respectfully refer your Honors thereto.

The City of New Orleans was incorporated by Act 159 of the General Assembly of the State of Louisiana, Session of 1912, and was therein granted "all powers, privileges and functions which, by or pursuant to the Constitution of this State, have been, or could be, granted to or exercised by any city."

> "An ordinance of a city fixing rates for water power supplied from a canal owned and maintained by the city, is a statute of the state in this sense."
>
> *King Mfg. Co. v. Augusta, 277 U. S. 100.*

> "A city ordinance is a law of the State within the meaning of Sec. 237 of the Judicial Code as amended, which provides a review by writ of

error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555."

Zucht v. King, 260 U. S., 174, at P. 176.

"The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, Sec. 237, which confers jurisdiction upon this court. Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555, and cases cited."

Reinman v. Little Rock, 237 U. S. 171, at P. 176.

"This court has jurisdiction under Sec. 237, Judicial Code, to determine whether there is a contractual obligation which plaintiff in error is entitled to enforce without its being impaired by the operation of subsequent legislation enacted by or under the authority of the State."

Louisiana Ry. & Nav. Co. v. New Orleans, 235 U. S., 164.

"We think that it sufficiently appears that this question was raised in the state court, and as the state court gave effect to the repealing resolution the case is properly here. It is therefore the duty of this court to determine for itself whether a

contract existed and whether its obligation has been impaired. Douglas v. Kentucky, 168 U. S. 488, 502; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148; Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544, 551; Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 556; Louisiana Railway & Navigation Co. v. New Orleans, decided this day, *ante*, p. 164."

N. Y. Electric Lines v. Empire City Subway, 235 U. S. 179, at P. 186.

"A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. New Orleans Water Works v. Louisiana Sugar Co., 125 U. S. 18, 31; Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 266; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148; Northern Pacific Railway v. Duluth, 208 U. S. 583, 590; Grand Trunk Ry. v. Indiana R. R. Comm., 221 U. S. 400, 403; Ross v. Oregon, 227 U. S. 150, 162.

"And any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the pertinent clause of Sec. 709, Rev. Stat.; Judicial Code, Sec. 237; which confers jurisdiction on this court. Williams v. Bruffy, 96 U. S. 176, 183."

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, at P. 555.

"In cases arising under the contract clause of the Federal Constitution this court determines for itself, irrespective of the decision of the state court, whether a contract exists and whether its obligation has been impaired, and if plaintiff in error substantially sets up a claim of contract with allegations of its impairment by state or municipal

legislation, the judgment of the state court is reviewable by this court under Sec. 709, Rev. Stat."

Northern Pacific Railway v. Duluth, 208 U. S. 583.

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, at P. 10.

See also:

Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135;

Fiske v. Kansas, 274 U. S. 380;

Bluefield Co. v. Public Service Comm., 262 U. S. 679;

Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248;

C. B. & Q. Railway v. Drainage Comm'rs., 200 U. S. 561;

Chicago &c., Railroad v. Nebraska, 170 U. S. 57.

We, therefore, respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATEMENT OF THE CASE.

On July 27, 1909, the Council of the City of New Orleans adopted Ordinance No. 6032 New Council Series, directing the Comptroller of the City to advertise for sale and to sell at public auction a franchise, right of way and right to construct, maintain and operate a line of street railway i. e., a double track street railway beginning on Lafayette Avenue at the corner of Villere Street and extending on Lafayette Avenue to the intersection of Franklin Avenue, thence along Franklin Avenue to the intersection of St. James Avenue. (See copy of Ordinance, Document 12 of Defendant's Exhibits).

On December 17, 1909, by notarial act before Robert Legier, Notary Public (see copy Document 13 of Defendant's Exhibits) the City of New Orleans, pursuant to public adjudication by the Comptroller, and to the provisions of said Ordinance No. 6032 N. C. S., granted to New Orleans Railway & Light Company a franchise for a street railway in the City of New Orleans from Lafayette Avenue and Villere Street to Franklin Avenue and St. James Avenue, in accordance with the provisions of the aforesaid ordinance, which is copied *in extenso* in said notarial act. Paragraph 10 of Section 2 of said ordinance reads as follows:

> "The purchaser is obligated herein to construct and operate the railway provided for herein within twelve months after the signing of the contract provided for, and to this end, at least one track with the necessary curves, switches, etc., shall be

completed at that time, but the construction of the remainder need not be completed until such time as the purchaser may deem necessary."

Before said line of street railway was constructed on Franklin Avenue, the New Orleans Terminal Company, a steam railroad company, whose tracks ran along Florida Walk, objected to the street railway of the New Orleans Railway & Light Company crossing the railroad tracks of the New Orleans Terminal Company at grade on Franklin Avenue at the intersection of Florida Walk.

The City, being of opinion that the general public interest would be best subserved by the tracks of the New Orleans Railway & Light Company not crossing at grade, but that the said tracks should cross the tracks of the railroad company on a viaduct, and the Railway Company being satisfied to build such a viaduct, the Council of the City of New Orleans, on March 8, 1910, adopted Ordinance No. 6445 N. C. S. (Document 17 of Defendant's Exhibits, reprinted herein in Appendix) which directed and required the Railway Company to construct, subject to the approval of the City Engineer, a viaduct

"approximately on the center line of Franklin Avenue at and in the vicinity of the Florida Walk intersection, the said viaduct to embrace earthen embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue nor obstruct the roadways on said avenue."

The viaduct, which is of trestle construction, or, in other words, the track structure, being built on piles, was constructed in the year 1910, and thereafter, in Feb-

ruary of 1914, W. J. Hardie, then City Engineer, and Hon. E. E. Lafaye, then Commissioner of Public Property, approved a plan of the Railway Company for the earthen embankment or fill on said viaduct, and said embankment or fill was constructed. (See Plan, Document 1 of Defendant's Exhibits). The viaduct, since its construction in 1910, has been and still is, in operation.

The viaduct and its earthen embankment approaches, at the time of their respective construction, did not exceed the neutral ground space as it then existed on Franklin Avenue, nor did it obstruct the roadways thereon. At the time of the construction of the viaduct and at the time of the construction of the earthen embankment, the roadways on Franklin Avenue were not paved. They were paved in 1927, after the adoption of Ordinance No. 9375 C. C. S., hereinafter referred to; and in paving said roadways, the width of the sidewalks was increased and the width of the neutral ground narrowed thereby, throwing a part of the earthen embankment into what would have been roadway.

New Orleans Public Service Inc., appellant herein, acquired the rights of New Orleans Railway & Light Company in and to the franchise aforesaid by Special Master's deed in the matter of *New York Trust Company v. New Orleans Railway & Light Company*, No. 16,953 In Equity, Consolidated Cause, United States District Court for the Eastern District of Louisiana. (See Admission Tr. P. 151).

In 1926, petitions were addressed to the Commission Council of the City of New Orleans asking, for various

reasons, that the viaduct be demolished. The Council caused an investigation to be made to ascertain the condition of the structure. The report made to the Council indicated that the viaduct was becoming unsafe, though not so much so as to require the immediate cessation of all traffic over it. On November 16, 1926, the Commission Council of the City adopted Ordinance No. 9375 C. C. S. (Tr. P. 9) ordering appellant to remove the viaduct; to construct, operate and maintain a double line of tracks for the operation of its cars at street level along Franklin Avenue and across Florida Walk; and that the work of dismantling and removing said viaduct should be completed within one year after the passage of said ordinance.

Appellant refused to comply with said ordinance and the City brought suit (See Petition, Tr. P. 1).

The grounds chiefly relied on by the City for the demolition of the viaduct are

(1) That is was not constructed in accordance with the provisions of Ordinance No. 6445 N. C. S.;

(2) That it has deteriorated and has not been maintained in a safe and proper manner and its use has become dangerous to the public; and

(3) That, as constructed, it permits of the construction of but one street car track thereon, which is insufficient for the requirements and needs of the people in that section using street railway service.

Appellant resisted the suit of the City on the grounds, among others, (See Answer, Tr. P. 10) that the viaduct had been constructed in accordance with the provisions of said Ordinance No. 6445 N. C. S.; that the viaduct had not become dangerous and had been maintained in a safe and proper manner; that the said street car line is and has always been entirely sufficient for the requirements and needs of the people of that section; that Appellant's predecessor in title of the franchise had been by Ordinance No. 6445 N. C. S. directed and required in the interest of public safety to construct said viaduct; that the viaduct was constructed at a cost of approximately $58,000.00; that the viaduct was required to be built over the tracks of the New Orleans Terminal Company (now Southern Railway Company) because at that point a grade crossing was dangerous by reason of the fact that there are eight steam railroad tracks almost continually used by said Southern Railway and other companies for the switching and operation of trains and cars during the day and the night; that there is no need whatever now to require the destruction of said viaduct and to require Appellant to cross eight tracks of the Southern Railway Company at grade crossing, which would not only be a needless expense involving a cost in excess of $135,000.00 (testified to be at $137,000.00) besides the loss of the $58,000.00 already expended by Appellant's predecessor, but would subject the Appellant and the users of said street railway line to the grave hazards and dangers of grade crossing accidents which the viaduct was intended to and does eliminate; that there is and was no justification for the passage of Ordinance No. 9375 C. C. S. requiring the demolition of the viaduct and that appellant should rebuild its

tracks across the Southern Railway Company tracks at grade; that the passage of said ordinance was unjust,arbitrary and oppressive; that it was not a legitimate exercise of the police power of the City and not required by any consideration of safety to the public; on the contrary, the demolition of the viaduct and the requiring of appellant to cross said Southern Railway Company tracks at grade would introduce the grave hazards and dangers which the viaduct has all these years eliminated; that the said ordinance was passed not in the interest of public safety but in order to satisfy certain property owners who considered that their property was being damaged by the presence of the viaduct and for no other adequate reason; that appellant's predecessor was required by the City to build said viaduct originally at a heavy cost in order to obviate the dangers of a grade crossing and to now require defendant to demolish the viaduct, which the City itself ordered should be built and to establish a grade crossing is not a legitimate and proper exercise of the police power of the City, but an arbitrary exercise thereof, utterly illegal, and a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article I of the Constitution of the United States.

On the trial of the case, without any written reasons the District Court rendered judgment (Tr. P. 17) in favor of the City in accordance with the prayer of the petition. On appeal therefrom, the Supreme Court of Louisiana affirmed the judgment (Tr. P. 161; 168 Louisiana Reports

984) and in due course denied a rehearing (Tr. P. 166); hence this appeal (Tr. P. 166-167).

IV.

SPECIFICATION OF ERRORS.

The Supreme Court of Louisiana erred in holding

(a) That the provisions of Ordinance No. 9375 C. C. S., requiring Appellant to demolish the viaduct which the City of New Orleans ordered should be built, and requiring Appellant to establish a grade crossing, was a legitimate and proper exercise of the police power of the City of New Orleans and was not violative of the Fourteenth Amendment, Section 1, of the Constitution of the United States, as depriving Appellant of its property without due process of law;

(b) That said Ordinance No. 9375 C. C. S., requiring the demolition and removal of the viaduct was not an impairment of the obligations of Appellant's contract rights with the City of New Orleans and was not violative of Section 10 of Article I of the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

Considering (1) that by virtue of its franchise and the ordinance requiring the construction of the viaduct, Appellant has a vested right therein; (2) that the viaduct was required by Ordinance No. 6445 N. C. S. to

be constructed in the interest of public safety and at a cost of approximately $58,000.; (3) that it was constructed in accordance with the terms and provisions of said ordinance; (4) that the encroachment of the earthen embankment or fill of said viaduct was caused by the City itself in taking part of the roadway for sidewalk purposes and part of the neutral ground for roadway purposes, thereby narrowing the neutral ground and which encroachment could have been eliminated by the City ordering part of said fill removed; (5) that the viaduct has not deteriorated and has been maintained in a safe and proper manner and the use thereof has not become dangerous to the public; but even if it has deteriorated, it can be repaired; (6) that although it does permit of only one track thereon, yet one track is amply sufficient for the needs and requirements of the people using street car service in that section; (7) and that to require Appellant to take down said viaduct and to require it to rebuild its tracks so that its street car line should cross eight steam railroad tracks at grade, at a cost of approximately $137,000. in addition to the loss of the $58,000. now invested in the viaduct and to subject Appellant and the users of said street railway line to the grave hazards and dangers of grade crossing accidents, which the viaduct was intended to eliminate and has all of these years eliminated, the conclusion is inevitable that the passage of Ordinance No. 9375 C. C. S., requiring the demolition of the viaduct and that Appellant should rebuild its tracks across eight steam railroad tracks at grade was unjust, arbitrary and oppressive and was not passed in the interest of public safety, but in order to satisfy certain property owners who consider that their property is being damaged by the pres-

ence of said viaduct, and for no other adequate reason; and that the passage of said ordinance presents the question as to whether the City of New Orleans has stepped outside the domain of the legitimate exercise of its police power on to ground forbidden by the due process and contract clauses of the Fourteenth Amendment and Article I of the Constitution, respectively. We, therefore, hope to demonstrate an encroachment on Federal guarantees in that:

Ordinance No. 9375 C. C. S. bears no direct, real or substantial relation to any phase of the public safety or welfare; its passage was unjust, arbitrary and oppressive and not a legitimate exercise of the police power of the City; and is, therefore, invalid, a deprivation of Appellant's property without due process of law and an impairment of the obligation of Appellant's contract rights with the City.

ARGUMENT.

A mere reading of Ordinance No. 6445 N. C. S., shown in the Appendix herein, clearly shows that the viaduct was constructed to subserve the general public interest by the said tracks not crossing at grade and the uncontradicted testimony is that the value or cost of the viaduct now stands at $58,189.00. (See testimony Mall Tr. P. 128).

The City made no attempt to show or to prove that the viaduct was not constructed in accordance with the terms and conditions of Ordinance No. 6445 N. C. S., except its attempt to show that the embankment or fill

encroaches on the lower side paved roadway. In fact, the City could not show or prove that the viaduct was not constructed in accordance with the terms and conditions of said ordinance, because the embankment or fill was constructed under plans approved by the then City Engineer and the then Commissioner of Public Property; it did not exceed the then neutral ground and the present encroachment was brought about by the City itself. Franklin Avenue, at the time of the placing of the embankment or fill on the viaduct, was and still is 128 feet wide from property line to property line and the neutral ground, at that time, was 68 feet wide, with 30 feet on each side from the neutral ground to the property line. The fill at its widest part, on the upper side of Franklin Avenue, was approximately 12 feet from the edge of the neutral ground, and on the lower side, the fill was approximately at the edge of the neutral ground. The fill occupies the same position to-day as it did in 1914; but when in 1927 the City paved Franklin Avenue, it made a 10 foot sidewalk and a 28 foot roadway, 38 feet in all, on the upper side, taking 8 feet off the neutral ground, and made a 12 foot sidewalk and an 18 foot roadway, 30 feet in all, on the lower side. Making a 12 foot sidewalk on the lower side, naturally left only 18 feet of roadway. About the center of the viaduct it crosses a canal known as the Florida Walk Canal. Although the upper roadway is 28 feet wide, the bridge crossing this canal is 24 feet wide. The roadway on the downtown side is now 18 feet and the width of the bridge crossing the canal is 19 feet. (See testimony of Mall, Tr. P. 129). If a 19 foot bridge is ample to take care of vehicular traffic, it is likewise

reasonable to suppose that an 18 foot roadway at that point is likewise sufficient to take care of such traffic. However, if it is not sufficient, the City, instead of ordering the entire viaduct down merely because of this narrowing of the roadway due to the fill or embankment, could have ordered Appellant to remove that part of the fill necessary to widen the roadway.

The City says that the viaduct has deteriorated, has not been maintained in a safe and proper manner and is, therefore, dangerous. Two witnesses were produced by the City to prove this, to-wit, Godat, Bridge Engineer of the City, and Wyler, Assistant Engineer, Street Construction Department.

The viaduct is of trestle construction, that is, the track structure is built on piles driven into the ground, beginning with three pile bents and as the slope of the viaduct increases in height it has four pile bents. Extending crosswise over each row of piles is a 12 inch by 12 inch cap; then longitudinally over these caps are two 7 inch by 14 inch stringers on each side, staggered, so that four 7 inch by 14 inch stringers always extend over two bents or three rows of piles; crosswise on top of these stringers cross-ties are placed and then on these cross-ties the rails and guard rails are laid.

Godat, witness for the City, says he made an inspection of the viaduct in 1926; that he found the viaduct unsafe, primarily on account of the condition of

the bents which support the stringers and the track structure itself; in some bents, the caps had rotted and in others the piling had rotted. He made another inspection on December 31, 1928, and January 2, 1929, and found the condition improved over the inspection of 1926, in that some of the bents formerly considered dangerous, had been removed, but he found other bents dangerous; the bridge proper, that is, the steel work, was in very good condition; the track system was in fair state of repair with the exception of certain ties which had begun to rot; the stringers were good and the caps, with three exceptions, were good. On cross-examination, he testified that he had made a report of his 1926 inspection (which report was not sent to Appellant) to the Commissioner of Public Utilities. The viaduct was considered by him safe temporarily and with the correction of a certain defect at bent 28 (which defect at bent 28 was corrected), the structure would be safe for the operation of cars. He also testified that certain of the piles showed evidence of cracking, meaning to convey the impression that these cracks were stress or load cracks.

Wyler, witness for the City, testified that he inspected only half of the viaduct and found that bent 13 only was dangerous.

Mall, engineer and witness for the defendant, testified that the viaduct had been constructed in accordance with an approved design and that he had seen innumerable structures over the country designed in the same way; that the deck structure, that is, the rails and ties and the part that can be seen on top, is gone over once a week by

a track inspector, who notices the parts for which he is responsible; the substructure is inspected by Appellant's engineers, giving it casual inspection once a month, and a detailed general inspection by these engineers is made quarterly; that the cars operated over the viaduct by Appellant weigh 22 tons, and loaded to their maximum capacity, with every available inch of space occupied, that is, with 175 passengers, whereas the normal or seating capacity of said cars is 52 passengers, the weight of the car with said passengers is 34 tons, or 68,000 pounds. The cars are double truck cars with two trucks with four wheels on each truck, the trucks being spaced 22 feet from center to center; the bent spacing of the viaduct is 15 feet, making the limit of the load on any one bent 50% of the car load or 17 tons or 34,000 pounds. Where the bent is composed of four piles, each pile carries one-fourth of 17 tons or 4¼ tons.

Godat, witness for the City, testified that pile "C" in bent No. 1 was dangerous and because that one pile was dangerous, the entire bent was therefore dangerous. Mall further testified that he had this pile "C" of bent 1 removed, and it showed evidence of heart rot continuing down for a depth of eight feet and with a view of learning what effect that deterioration had on the strength of the pile and what load would be required to cause stress checks in the remaining part thereof, he took a section two feet long, which represented the part of the pile which had deteriorated the most; the pile was approximately 16 inches in diameter; it was split into two parts and each part tested separately; one section required a load of 187,-500 pounds to produce the first evidence of stress cracking

and the other section required a load of 192,500 pounds to produce the first evidence of stress cracking, or a total of approximately 375,000 pounds for the whole pile. In other words, it took a load capacity approximately 33 times the weight of a car loaded to its maximum capacity to produce the first evidence of stress cracking in the pile.

The evidence is conclusive that this pile, which was criticized most severely by Godat, was not dangerous at all. The same can be said with regard to all of Godat's findings and criticisms. Mall further testified that the stringers are renewed when the decay has become extensive, but this at a time when that decay has not reached the point of danger; the caps are renewed in the same way and that the piles likewise are renewed whenever they show such evidence of decay; all of which is done in accordance with the monthly and quarterly inspections; that none of the piles in the structure showed evidence of stress checks or cracking, but what they do show is weather checking, which has no bearing on the strength of the pile.

It was an undisputed fact that in the nineteen years since the viaduct had been constructed and in operation, not one single accident had been due to any defect in the viaduct.

From the evidence of Mall and Guillot, engineers for Appellant, this viaduct has been maintained in a safe and proper manner and the use thereof had not become dangerous to the public. If there were or are any defects in this viaduct, which the City's engineers deem unsafe, the City can order these defects corrected at once and there is no

need or reason for the demolition of the entire structure because a few members or timbers of the structure, which can be easily renewed or repaired, are deemed to be defective or dangerous by the City's engineers.

Although the viaduct, as constructed, permits of the construction of but one street car track thereon, this one street car track is sufficient for the requirements and needs of the people of that section of the City. The Supreme Court of Louisiana found that the contention of the City that the viaduct should be removed because it is so constructed is scarcely sufficiently supported by the evidence to justify the removal of the viaduct; that it did not appear to the Court that the population has so increased as to call for the removal of the structure in order to provide for double tracks.

The City contended that because street cars of this line pass over a series of tracks owned and operated by the Louisville & Nashville Railroad Company at grade, crossing the viaduct over the Southern Railway Company's tracks fails to provide any real protection from the dangers that might be encountered by reason of grade crossings. This contention is so untenable that it hardly merits argument. It is obvious that if there are two series of railroad tracks over which street cars run, both of which were dangerous to street car traffic, and one of these grade crossings was eliminated by the construc-

tion of a viaduct, it necessarily would cut down the danger of accident by 50%. Moreover, the same conditions do not exist at both crossings. At the L. & N. crossing, there are only three tracks, two main lines tracks and one switch track, while at the Southern Railway crossing, there are eight tracks, two main line tracks and six switch tracks, the danger at the latter crossing being approximately three times the danger at the L. & N. crossing. Exhibits D-1 and D-2 (Documents 5 and 6 of Appellant's Exhibits) show that for the period September 1, 1926, through September 30, 1927, 24,136 trains of the Southern Railway Company crossed Franklin Avenue, or an average of 61 trains hauling 683 cars per day; that for the period from October 1, 1927, to September 30, 1928, 23,028 trains crossed Franklin Avenue, or an average of 63 trains per day, hauling an average of 642 cars.

If it was necessary in the interest of public safety to construct the viaduct in 1910 by reason of the dangers existing at the Southern Railway crossing, and the viaduct was not required to be extended across the railroad tracks of the L. & N. Company by reason of the fact that there was no such continuous switching and operation of trains and cars thereover as was at said Southern Railway crossing, then we say that there is now no justification for the demolition of the viaduct and the requiring of defendant to cross said Southern Railway tracks at grade crossing, which would introduce the grave hazards and dangers which the viaduct has all these years eliminated. There is now and was no justification for the passage of Ordinance 9375 C. C. S. requiring the demolition of the viaduct

and for requiring Appellant to rebuild its tracks across the Southern Railroad Company tracks at grade. The passage of said ordinance was unjust, arbitrary and oppressive, not a legitimate exercise of the police power of the City, and not required by any consideration of safety to the public; but the ordinance was passed in order to satisfy certain property owners who consider that their property is being damaged by reason of the viaduct, and for no other adequate reason.

When the removal of this viaduct was first agitated in 1926, the matter was referred to Mr. Hall, Commissioner of Public Utilities of the City of New Orleans, and as will be seen by his special report under date of August 3, 1926, contained in the special proceedings of the Commission Council of the City of New Orleans of that date. (Document 14 of Appellant's Exhibits). He gives a report of the number of steam railroad cars handled on the tracks which run under this viaduct and he says:

> "It is a recognized fact all over the country that grade crossings are great elements of hazard and millions of dollars are being expended in their elimination, and it is being done as rapidly as finances will permit. It is my understanding that our City government recognizes the principle of elimination of grade crossings, and that it is their desire to adhere, wherever possible, to the opinions and advice as advanced by our most eminent engineers in matters of this character."

He further says:

> "I might state that at the present time there are 137 street cars per day operated over this via-

duct, this line of street cars handling over five million passengers the past fiscal year, a conservative estimate in my opinion being that about one-third of this amount of passengers travel over the viaduct each year. Operations over the viaduct by the street cars are on about six minutes average schedule the day around and there is no doubt but that if such operation was forced over a grade crossing that such schedule would of necessity be considerably lengthened as a result of the increased delays thereby caused."

At the meeting of the Commission Council of August 17, 1926, as will be shown by the official proceedings thereof (Document 14-A of Appellant's Exhibits) Commissioner Hall again stated:

"It is the opinion of the Council so expressed in conference that we go on record as advocating the removal of grade crossings wherever practicable and wherever we deem same necessary, as streets are ordered paved. With this expression from the Council and the paving of Franklin Avenue being in progress, at the present time, it will be my pleasure to submit at a later meeting an ordinance to remove the Franklin Avenue viaduct and to also submit an ordinance to provide for the construction by the steam railroads a viaduct to take care of this grade crossing at Franklin Avenue. * * * This is a principle recognized by all municipalities and I am certainly happy to make this statement and see the Council go on record as favoring this forward and progressive step."

At the time of the hearing of Ordinance No. 9375, C. C. S., which was Calendar No. 9709, before the Commission Council, on November 2, 1926, as will be seen by

the official proceedings thereof (Document 4 of Plaintiff's Exhibits) Commissioner Hall again stated

> "that in view of the fact that a general policy ordinance relative to viaducting steam railroad tracks would be introduced to-night, he thought the matter ought to be held in abeyance until that ordinance was disposed of."

Again, on November 16, 1926, at the time the Commission Council adopted Ordinance No. 9375 aforesaid, as will be seen by the official proceedings of date November 16, 1926 (Document 10 of Appellant's Exhibits) Commissioner Hall again stated:

> "I beg to report favorably on Calendar 9799, an ordinance directing and requiring all railroads operating within the City limits of the City of New Orleans to viaduct their tracks at all grade crossings where density of traffic renders grade crossings dangerous and hazardous and where the streets are ordered paved by the City, and providing a penalty for the violation thereof."

and, again, in the same proceedings on the hearing on Ordinance Calendar 9799, just mentioned, Mayor O'Keefe stated:

> "That the Council had been and are opposed to grade crossings. * * *"

Thereafter, when Ordinance Calendar No. 9709, which became Ordinance 9375, C. C. S., was called up for adoption, Commissioner Klorer voted "No" "for the reason that in my judgment the proposed removal of the viaduct is prejudicial to public safety."

From the above and foregoing, it will be readily seen that the Commission Council was not in favor of grade crossings and that Ordinance No. 9375, which was adopted November 16, 1926, was adopted only because it was generally understood and held by the Commission Council that an ordinance would be adopted compelling the steam railroads to viaduct their tracks. We feel safe in saying that to this date no such ordinance has been adopted and that for the simple reason that the construction of viaducts by steam railroads in the City of New Orleans would necessitate the expenditure of a very large amount of money, of which, as stated by the City in Article XI of its petition, the City would have to contribute, under Act 38 of 1924, one-half the cost thereof, and the City is not financially able to contribute so large an amount out of its alimony. Almost simultaneously with the trial of this cause, which began on January 7, 1929, to-wit, on January 5, 1929, Commissioner of Public Utilities Hall and City Engineer Vallas were holding conferences with the officials of the Southern Railway Company looking towards the elimination of grade crossings at City Park Avenue and Canal Boulevard, in this City, as shown by the New Orleans States and the Item-Tribune of Sunday, January 6, 1929, being found at Documents 16 and 17 of Appellant's Exhibits.

The Commission Council may be vested with full and complete authority and control over the streets and may have full power, authority and control to regulate the operation of the street railway lines of Appellant; but we contend that where the City by Ordinance No. 6445, N. C. S., directed and required the predecessor of this defendant to

construct the said viaduct, which stands on defendant's books at a valuation of approximately $58,000.00, and where said viaduct has been maintained and operated with due regard to safety and it has proved entirely adequate and sufficient for the transportation of the users of said line, and where there is and was no justification for the passage of Ordinance 9375, C. C. S., requiring the demolition of said viaduct, and requiring Appellant to rebuild its tracks across said Southern Railway Company tracks at grade crossing, which would only be a needless expense involving a cost in excess of $135,000.00 in addition to the loss of the value of said viaduct, as aforesaid, the passage of said ordinance was unjust, arbitrary and oppressive and was not a legitimate exercise of the police power of the City, but an arbitrary exercise of this power, a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article I of the Constitution of the United States.

In *City of New Orleans v. Great Southern T. & T. Co., 40 Louisiana Ann., 41*, the defendant purchaser was granted the right by ordinance of the City of New Orleans to construct and maintain a line of telegraph through the streets of the City. Under said ordinance, defendant constructed and maintained telephonic lines through the streets, built according to the directions of the Administrator of Improvements and with his approval and complied in all respects with the terms of the ordinance. Some four years thereafter, the City Council adopted another ordi-

nance to regulate and control the erection and maintenance of poles for supporting wires of telephones within and on the streets of the City, one of the provisions of which required the payment of $5.00 per annum per pole for every pole erected or at present in use. The City claimed that the provisions of the ordinance was a regulation or condition imposed upon the maintenance of the poles, an exercise of the privileges which the City had a right to impose and without compliance with which the defendant could not lawfully continue to maintain and exercise them. The Court said:

> "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the Dartmouth College Case, 4 Wheat. 518."

In *East Louisiana R. Company v. City of New Orleans, 46 La. Ann., 526,* the City of New Orleans by ordinance, granted to plaintiff the privilege to construct and operate a railroad with steam power through certain streets of the City. The plaintiff company accepted the grant and proceeded to comply with it and expended over $3,000.00 in work. The City, believing the ordinance to be null and void, adopted another ordinance, repealing the ordinance granting it. The Court said:

> "Having granted the franchise to plaintiffs and it having been accepted, the contract was perfected. New Orleans v. Telephone & Telegraph Company, 40 Ann. 41."

In *Grand Trunk Western Ry. Co. v. South Bend*, *227 U. S., 544*, where the City of South Bend granted a franchise to the railroad company permitting the company to lay a double track through one of its streets and the railroad company constructed a single track part of the way, but subsequently when it decided to complete the laying of the double track, the City passed an ordinance repealing the franchise insofar as it permitted the laying of the double track through its streets. The Court said:

> "The ordinance of South Bend, Indiana, of 1868, permitting a railway company to lay a double track through one of its streets, and which had been availed of as to part of the distance, was a valid exercise of delegated legislative power, and no power to alter or repeal having been reserved, a subsequent ordinance repealing the franchise as to the double track was not a valid exercise of the police power to regulate the franchise, but an impairment of the contract and unconstitutional under the contract clause of the Constitution."

The court further stated in discussing this case:

> "Inconvenience natural to the proper use of a properly granted franchise cannot be made the basis of exercising the police power to destroy the franchise."

In the case at bar, the City is seeking to abrogate a part of the franchise granted to defendant for the Villere extension and to cause the destruction and removal of a viaduct erected and constructed under the direct order and

authority of the City, and which is being used in the customary manner. This Court in the above case further said:

> "Tracks laid in a street under legislative authority become legalized, and when used in the customary manner cannot be treated as unlawful either in maintenance or operation."

In *Owensboro v. Cumberland Telephone Company, 230 U. S., 58*, the City of Owensboro granted a franchise to the telephone company and with it the right to use the streets for the erection and maintenance of its poles and wires. The franchise was granted by ordinance of the City. Under that ordinance, the grantee proceeded to erect its plant and to place its poles and wires upon the streets and it and its successors and assigns had ever since maintained and operated a telephone system. Some twenty years afterwards, the City passed an ordinance requiring the telephone company to remove from its streets all of its poles and wires within a reasonable time after the passage of the ordinance and upon failure to so remove, the Mayor was directed to have them removed. The court said:

> "If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance passed upon legislative power without violating the prohibition placed in the Constitution for the protection of property rights."

In the case at bar, the City is seeking to destroy part of the street car franchise by compelling the removal of the Franklin Avenue viaduct. The police power of a municipality cannot be used to revoke or repeal an ordinance under which property rights have been granted

as in this case and thus destroy such property rights. The court, in the *Owensboro* case, above referred to, further said:

> "A reservation to alter or amend in a municipal ordinance granting rights in the streets to a corporation to carry on a public utility, as the necessities of the city demand, is simply a reservation of police control incidental to the unabridgeable police power and does not reserve a right to revoke or repeal the ordinance itself."

In *City of Chicago v. Pittsburg C. C. & St. L. Ry. Co., 91 N. E. Reporter, 422,* the City of Chicago passed an ordinance in 1872 granting to the defendant's predecessors the right to lay railroad tracks on certain streets on the condition that the railroad company should erect and maintain viaducts over its tracks at certain streets for the public safety. The railroad company laid its tracks and complied with the terms of the ordinance by erecting the viaducts. In 1901, the City passed another ordinance to compel the railroad company to elevate its tracks. The Court said:

> "Railroad corporations are subject to police regulations in the interest of the public safety and welfare, and power has been given to cities to do certain specific things in the exercise of that power and a general authority to pass and enforce all necessary police ordinances, and to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to them. But the Legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of police measures and their assumed pur-

pose. Counsel also lose sight of the rule of law that where power to legislate on a given subject is conferred on a municipal corporation, and the details of the legislation are not prescribed by the Legislature, it is implied that the power will be reasonably exercised. Assuming that the elevation of railroad tracks comes within the general police power with which cities are invested, the power is given in general terms and an ordinance passed for that purpose, must be reasonable or it will be pronounced invalid."

* * * * * *

"The objects of viaducts and elevated tracks are the same—i. e., to eliminate grade crossings and the danger, delays, and inconvenience connected with them—and there is nothing tending to show that elevated tracks would be any safer for the public than viaducts. The viaducts had been built in pursuance of the ordinance of 1872 at great expense, and other viaducts were provided for by that ordinance. If they secured the public safety, an ordinance requiring the defendant to tear them down and elevate its tracks against its will would necessarily be held unreasonable and void on the same ground as the decision in Hawes v. City of Chicago, *supra*. It was there held to be unreasonable, unjust, and oppressive to compel an owner to construct and pay for a wood sidewalk, and, when it was in substantially as good condition as when first built and in all respects safe, convenient, and sufficient for public use and travel, to take it up, throw it away, and put down a different sidewalk at his own expense. The city having provided for the public safety, according to the judgment of the city authorities when the original ordinance was passed, by the viaducts specified therein and the requirement for the contruction of others as called for, an ordinance requiring them to be torn down without any change in conditions would not have been a

legitimate exercise of the police power, and it does not appear that any new contingency had arisen requiring or authorizing any such action."

From the above quoted decision, it will be readily seen that the City of New Orleans, having in the interest of public safety, by Ordinance No. 6445, N. C. S., ordered and directed the defendant's predecessor to erect a viaduct, the passage of Ordinance No. 9375, C. C. S., requiring this viaduct to be torn down, when there has not been shown to be any change in the conditions existing at the Southern Railway crossing, is not a legitimate exercise of police power and the City Council, under the guise of police regulations, cannot abitrarily invade personal rights or private property, and Ordinance 9375, C. C. S., should be, by this Honorable Court, held invalid, just as the Supreme Court of Illinois held the ordinance invalid in the case from which we have quoted above.

In *State v. Kansas City Terminal Railway Co., 168 S. W. Reporter, 1144*, the court said:

"On the construction of a union station in a city, certain property owners formed a corporation to build a viaduct along a street over defendant's tracks at a point where the street was about 60 feet wide. The street had a general width of 80 feet, but for a portion of the distance, including the space to be occupied by the viaduct, was of various widths from 60 to 70 feet. By permission of the city the viaduct was constructed to the full width of the street, and after this, the station having been completed, an ordinance was adopted widening the street to 80 feet, and another ordinance passed requiring defendant terminal railway company to widen the viaduct, so as to make it conform to the

new width of the street. Held that, in the absence of an actual test of the capacity of the streets leading to and in the immediate vicinity of the station, to accommodate the traffic, the latter ordinance was void for unreasonableness."

In the case at bar, there has been no showing that a roadway 18 feet wide on the lower side of the viaduct is not sufficient to take care of the traffic using that roadway. While the roadway itself on both sides of Franklin Avenue on the river side of the viaduct is 28 feet wide, the roadways on both sides of Franklin Avenue on the lake side of the viaduct are only 24 feet wide. Moreover, the bridges belonging to the City across the Florida Walk Canal, which flows under the very center of the viaduct, are only 19 feet wide on the lower side and 24 feet wide on the upper side roadway. If the bridge on the lower side is only 19 feet wide and is able to take care of the traffic, then a roadway 18 feet wide on the lower paved roadway is likewise sufficient to take care of automobile and vehicular traffic.

In *City of Chicago v. New York, C. & St. L. R. Co., 216 Fed., 734 at P. 738*, the Court said:

"Two distinct elements, in our opinion, appear in the 1909 ordinance. One is a grant of a property right. Under Illinois law a railroad company has authority to locate its right of way, including a way upon or across streets, without consulting the city. That authority flows from the sovereign. The only limitation is that construction of the railroad upon or across a street shall not be undertaken without the assent of the city. When the city assents, the property right becomes as completely vested as if the grant had been directly from

the sovereign. C. & W. I. R. Co. v. Dunbar, 100 Ill. 110; Tudor v. Rapid Transit R. Co., 154 Ill. 129, 39 N. E. 136. And of course a vested property right cannot be taken away without just compensation or due process of law. Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405. So when Chicago by its assent expressed in the 1909 ordinance completed appellee's title to a right of way across Seventy-Ninth street at the designated place, in latitude and longitude, power was lacking thereafter to destroy or impair the property right by an ordinance of the character of that of 1912."

In *Chicago & N. W. Ry. Co. v. Ochs, 249 U. S. 416 at P. 421*, this Court said:

"Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one."

In *Grand Trunk Western Ry. Co. v. South Bend, supra, at P. 556*, this Court also said:

"The ordinance passed in pursuance of the Indiana statute was an entirety. When accepted it became binding in its entirety. If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the State's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of

> great highways of commerce, similar in their nature to the street itself. Such consequences though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated legislative power."

In its opinion, the Supreme Court of Louisiana cited as authority therefor only two cases, that of *City of Shreveport v. Kansas City S. & G. Ry. Co., 167 La. Repts. 771 (120 So. 290)* and *Chicago & Alton Ry. v. Tranbarger, 238 U. S. 67.*

In the *Shreveport* case, the Court found that:

> "Prior to the institution of this suit, the City Council found, 'as a fact' in a resolution adopted by that body: 'That the piers erected and maintained by the Kansas City Southern Railway Company in Marshall Street for the support of the bridge over said street, encumber said street and prevent and embarrass the use of same and render the same unsafe for travel. That in order to restore to the public the free and safe use of said street, it is necessary that said piers be torn down and removed.' "

There is not a scintilla of evidence, documentary or otherwise, in the record of the case at bar showing that the Commission Council of the City of New Orleans found as a fact that the viaduct prevented and embarrassed the free use of the streets, nor was there any charge in the suit of the City that it did so.

In the *Shreveport* case, the Court found that the charter of the City conferred power on the Council to make and pass such ordinances as are necessary and proper:

> "To regulate and make improvements to the streets, alleys, public squares, wharves and other public property.
>
> "To determine the completion and dimensions of the pavements of the streets, to fix the squaring, and to prevent any encroachment upon or stopping and obstructing the streets, alleys, public squares, levees, public roads, or any part of the landing or port of Shreveport **and to order any object, whatever may be its value which may encumber said places, or prevent and embarrass the free use of same, to be torn down and removed * * * .**"

Commenting on this clause in the charter of the City of Shreveport, the Court stated that in *Agurs v. McKellar, 129 La., 186*, this section of the City charter had been construed and the rights of the City of Shreveport had been defined as follows:

> "The above quoted provision of the charter of the City of Shreveport confers upon the Council two separate and distinct powers: One, 'to prevent any encroachments upon or stopping and obstructing the streets'; and one, to 'order to be torn down and removed any object which may encumber the street or prevent and embarrass the free use of same.' The first of these powers looks to the future. It has reference to all attempts whatsoever at encroaching upon or obstructing the street, be the encroachment or obstruction serious or insignificant, big or small. * * * **The second of these powers has reference to cases where at some time in the past, with or without permission of the City authorities, through inadventure or otherwise,** some object

has been constructed, in whole or in part, upon the street, **and, because of the permission given** or because of peculiar circumstances or, indeed, simply because of the long acquiescence, **whereby conditions have been allowed to develop and interests to grow, it would be inequitable to disturb the existing situation unless the public interest actually required it. In the latter class of cases and in the exercise of this second power, the City Council is authorized to order the object to be torn down and removed if it encumber the street or prevent and embarrass its free use."**

We have been unable to find any provision in the charter of the City of New Orleans conferring upon the Council a power similar to the second of the powers which the Court found to be among the powers granted in the charter of the City of Shreveport.

In the *Shreveport* case, the Court further stated that:

> "No principle of constitutional law is better settled in this country than the principle that neither the Legislature nor the people themselves, much less their servants, can bargain away * * * the public safety * * * ."

In the case at bar, there was no bargaining away of the public safety by the City of New Orleans, and there was no permission of the City authorities granted to defendant's predecessor to erect the viaduct. As heretofore stated in this brief, in the City's petition, it alleged that Ordinance 6445 **"directed and required** the New Orleans Railway & Light Company to construct" the viaduct.

In the *Shreveport* case, the ordinance granting permission to the railroad company to erect the viaduct gave them the right to encroach on the paved portion of the street. There was, therefore, an encroachment of the street from the very time the viaduct was erected. In the case at bar, there was no encroachment of the street contemplated by Ordinance 6445, as that ordinance specifically provided that the viaduct should be constructed approximately on the center line of Franklin Avenue and to embrace earthen embankment approaches as would not exceed the neutral ground space nor obstruct the roadways of said avenue. As heretofore pointed out, when the viaduct was erected, it was erected approximately on the center line of Franklin Avenue and the earthen embankment approaches did not exceed the neutral ground space nor obstruct the roadways. The obstruction of the lower paved roadway was brought about, not by any act of the defendant or its predecessor, but by the act of the City itself in attempting to occupy for street and sidewalk purposes more than the thirty feet of space between the edge of the neutral ground and the property line, as shown by the plan (Document I of Appellant's Exhibits) approved by the City Engineer in 1914.

In the *Shreveport* case, the Court further stated that in the case of *New Orleans Gas Light Company v. Drainage Commission, 197 U. S., 453*, this Court declared that every reason of public policy required that grants in the subsurface of streets shall be held subject to such reasonable regulations as the public safety may require. Our contention is that Ordinance 9375, C. C. S., is not a reasonable regulation of the City, but the passage of that ordi-

nance was unjust, arbitrary and oppressive, and was passed, not in the interest of public safety, but in order to satisfy certain property owners who consider that their property is being damaged by the presence of said viaduct and for no other reason. In the petition presented to the City Council by the property owners and residents of that section, which was offered in evidence, but, which, upon objection of counsel for defendant, the Lower Court refused to permit counsel for the City to file in evidence, one of the reasons stated for the removal of the viaduct was "that the same causes a depreciation in the value of the real estate owned in that locality."

The case of *Chicago &. Alton Ry. Co. v. Tranbarger, supra*, has no bearing on the issues involved herein and is not at all analogous. Of course, it does repeat the well-known principles that neither the contract clause nor the due process clause of the Federal Constitution has the effect of overriding the police power of the State and that the police power embraces regulations designed to promote the public convenience or the general welfare or safety; also that it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without due process of law in the sense of the Fourteenth Amendment, but that is as far as the case goes.

We repeat:

(1) The viaduct was ordered and directed to be constructed under Ordinance 6445, N. C. S., the provisions of which required that the earthen embankment approaches should be of such width as should not exceed

the neutral ground space; the embankment was constructed under plans approved by the City Engineer; the embankment did not exceed the then neutral ground space, and inasmuch as it did not exceed such neutral ground until the City itself sought to narrow same, and inasmuch as the present condition of the lower roadway on Franklin Avenue was brought about by the City itself, the City should not now be heard to say that the viaduct was not constructed in accordance with the terms of the ordinance or that it has been maintained and operated in violation thereof. There has been no showing and no proof offered that the viaduct was not constructed in accordance with the terms of said ordinance or has been maintained and operated in violation thereof;

(2) The viaduct has been maintained in a safe and proper manner and the use thereof has not become and is not dangerous to the public. If there are any defects in this viaduct, or if any deterioration has taken place, which the City's Engineers might deem unsafe, the City can order these defects corrected; and the ordinance of the City, ordering the demolition of the entire structure because a few members or timbers therein might be deemed to be defective or dangerous by the City's Engineers, is arbitrary, unreasonable and oppressive, as there is no need or reason for the demolition of the entire structure where a few members or timbers therein can be easily renewed or replaced;

(3) Under the franchise, Ordinance No. 6032, N. C. S., the defendant does not have to double track that portion of its line operating over the viaduct until it is

deemed necessary by it so to do. Moreover, the evidence does not show that it is necessary for the needs of that section that the viaduct be demolished for the purpose of installing a double track at that point;

(4) There has been no decrease in the number of passengers using said line by reason of any dangerous condition thereof, or by reason of accidents happening thereon. We have conclusively shown that in all the time the viaduct has been in operation, no accident has occurred due to any defect therein, and the wild fears for the safety of passengers using said line, none of whom testified in the case, inasmuch as none of the witnesses who did testify ride the street cars and if they do then only to a very limited extent, are brought about by a desire to see the viaduct removed, not because of any danger to the riding public, but in order to appreciate real estate values;

(5) Although street cars of this line pass over the L. & N. Railroad Company tracks at grade, that is no reason why the viaduct over the Southern Railway tracks fails to provide any real protection from the dangers of grade crossings any more than to say that a street car viaduct over the Southern Railway tracks on Franklin Avenue is ineffective because the street cars on Carrollton Avenue cross the Illinois Central tracks at grade.

(6) If part of the earthen embankment approach to the viaduct, by reason of the widening by the City of the lower roadway and sidewalk in 1927, now encroaches on said paved roadway, the City can order that part of said earthen embankment removed so as to permit

of a 24-foot roadway on the lower side of Franklin Avenue on the side of this viaduct, as the roadway on the lake side of the Southern Railway crossing was made only 24 feet by the City, and because of this slight encroachment, there was no need to order the demolition of the entire viaduct;

(7) In 1910, when this line was built and the franchise granted to defendant's predecessor, the City, in order to eliminate a grade crossing at the Southern Railway tracks, and in the interest of public safety, ordered this viaduct erected and constructed, and to now say that this viaduct should be removed when the same dangers of a grade crossing at said Southern Railway tracks exist, is not a valid exercise of the police power, but an unreasonable, arbitrary, unjust and oppressive exercise thereof. If the City could order this viaduct erected and can now order it removed, when conditions are unchanged, next week or next month or next year, who knows but what it might order the viaduct erected again?

We submit that the ordinance was not passed in the interest of public safety, because public safety does not require the demolition or removal thereof; but that said ordinance was passed for the purpose of satisfying property owners in that section who considered that their property was being damaged by reason of said viaduct and for no other adequate reason; that having ordered and required that said viaduct be erected, and now to require defendant to demolish the same and to establish a grade crossing at the Southern Railway tracks, is not a legitimate and proper

exercise of the police power of the City, but an arbitrary exercise thereof, a deprivation of defendant's property without due process of law, and an impairment of the obligation of its contract rights with the City, in violation of the Constitution.

Under the circumstances, and for the reasons set forth herein, we respectfully pray that the judgment of the Supreme Court of Louisiana be reversed and plaintiff's suit be dismissed at its cost.

Respectfully submitted,

CHARLES ROSEN,
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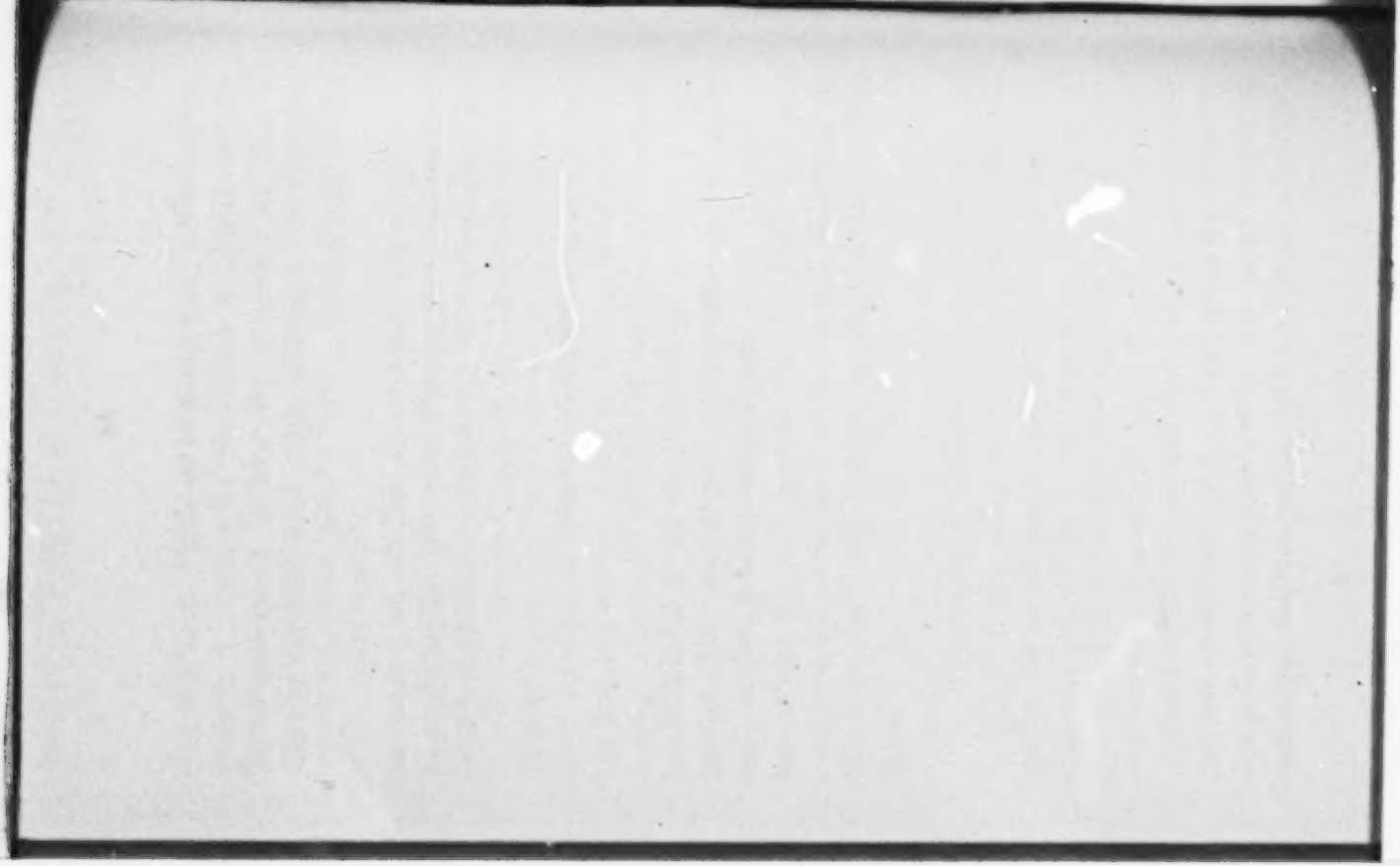
Attorneys for New Orleans Public Service Inc., Defendant and Appellant.



APPENDIX.

Mayoralty of New Orleans,
City Hall, March 9, 1910
Calendar No. 8618.

NO. 6445 NEW COUNCIL SERIES

Whereas the New Orleans Terminal Company has objected to the New Orleans Railway and Light Company crossing its tracks at grade on Franklin Avenue, at the intersection of Florida Walk, in connection with the franchise granted by the said New Orleans Railway and Light Company by Ordinance No. 6032, New Council Series, and.

Whereas the general public interest will be best subserved by the said tracks not crossing at grade, but that the said tracks cross the tracks of the New Orleans Terminal Company on a Viaduct; and

Whereas the New Orleans Railway and Light Company is satisfied to build such Viaduct; therefore

BE IT ORDAINED by the Council of the City of New Orleans, That the City Engineer be and he is hereby authorized to approve plans for a Viaduct to be constructed by the New Orleans Railway and Light Company, approximately on the centre line of Franklin Avenue, at, and in the vicinity of the Florida Walk intersection, the said Viaduct to embrace earthen embankment approaches

of such height and width as will not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways on the said avenue.

Adopted by the Council of the City of New Orleans, March 8, 1910.

GEORGE FERRIER, JR.,
Clerk of Council.

Approved March 9, 1910.

MARTIN BEHRMAN,
Mayor.

FILE COPY

NOV 2

CHARLES E.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE, INC.,

Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

Statement Against the Jurisdiction Asserted by the New Orleans Public Service, Inc., Appellant.

BERTRAND I. CAHN,
City Attorney;

WM. F. CONKERTON,
Asst. City Attorney.

For City of New Orleans, Appellee.

BOOKBINDERS-ARMBEE PRINTING CO. INC., 419-421 CHARTRES, N. O.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE, INC.,

Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

Statement Against the Jurisdiction Asserted by the New Orleans Public Service, Inc., Appellant.

The appellee, against the Court's jurisdiction asserted by the appellant of the right of this Honorable Court to review the above entitled cause on appeal respectfully shows:

(I)

NATURE OF THE CASE.

In the year 1910, the Council of the City of New Orleans passed Ordinance No. 6445 New Council Series,

permitting the New Orleans Railway & Light Co., the predecessor of the N. O. Public Service, Inc., appellant, to construct a viaduct **"approximately on the center line of Franklin Avenue,** at, and in the vicinity of the Florida Walk intersection," the said viaduct by the terms of said ordinance **"to embrace earthen embankment approaches of such height and width as"** would **"NOT EXCEED THE NEUTRAL GROUND SPACE ON FRANKLIN AVENUE, NOR OBSTRUCT THE ROADWAYS OF SAID AVENUE."**

At the time of the passage of this ordinance, Franklin Avenue was not open, the streets were not paved and that section of the City of New Orleans served by the street car line traversing the said viaduct was very sparsely inhabitated. Since that time (practically 19 years ago) that particular area or portion of the City of New Orleans has rapidly developed and has now become one of the thickly populated sections of the City. **Franklin Avenue has been opened and paved** and now carries a very heavy part of the travel and traffic of that section of the city, particularly, the automobile traffic.

The New Orleans Public Service, Inc., by Special Master's Deed, dated September 27th, 1922, in the matter *New York Trust Company v. New Orleans Railway & Light Co.*, No. 16,953, in Equity (Consolidated Cause) in the United States District Court for the Eastern District of Louisiana, acquired the franchise granted to the New Orleans Railway & Light Co., under Ordinance No. 6032 New Council Series, which was an ordinance permitting

the extension of the line which traverses and uses the viaduct hereinafter referred to.

The Commission Council of the City of New Orleans on November 17th, 1926, passed Ordinance No. 9375 Commission Council Series (R. pp. 8-a and 8-b) which required the New Orleans Public Service, Inc., to remove the said viaduct and to complete the removal within one year from the date of the passage of the Ordinance.

The New Orleans Public Service, Inc., having failed to comply with the terms and provisions of said ordinance, the Commission Council of the City of New Orleans adopted a motion authorizing and directing the Mayor of the City of New Orleans to institute and prosecute a suit requiring the removal of the said viaduct in compliance with the provisions of Ordinance No. 9375 Commission Council Series.

The appellant resisted the action and among other things alleged in its answer (R. p. 9): That its predecessor was required by the City Council in 1910, to construct said viaduct; that same was constructed at an approximate cost of $58,000.00; that it has been operated with due regard to safety; that it is adequate and sufficient for the transportation of the users of said line; that there is no need to require the destruction of the viaduct; that there was no justification for the passage of Ordinance No. 9375 Commission Council Series; that it was not a legitimate exercise of the police power of the City; that it deprives defendant of its property without due process of law.

There was judgment in the District Court, in favor of the City of New Orleans, (appellee), as prayed for (R. p. 15) and on appeal to the Supreme Court of the State of Louisiana, this judgment was affirmed. (See Appendix for copy of that decision).

(II)

The questions presented by the pleadings in the case are as follows:

The grounds relied upon by the City of New Orleans for the demolition of the viaduct are:

1st: That it was not constructed in accordance with the ordinance authorizing its construction.

2nd: That as constructed it permits of the laying of but one railroad track, which is insufficient for the present needs of the people of that part of the City, served by the railway line, crossing the said viaduct.

3rd: That by reason of decay and the failure to keep it in proper repair, the viaduct has become dangerous and unsafe.

The defense of the New Orleans Public Service, Inc., in effect, is a general denial, and a plea that to require the demolition of the viaduct would be to deprive it of its property without due process of law, in violation of the Federal and State Constitutions; and, further, that such action would be an impairment of its contract rights; and finally, that there is a denial to it of the equal protection of the

laws, in contravention to the 14th Amendment to the Constitution of the United States.

From the foregoing it will be observed that other questions were presented for decision aside from the Federal question raised by the appellant in its answer.

(III)

The Supreme Court of the State of Louisiana, as will appear from the opinion and decree of that Court (see appendix) based its decision upon the following questions, which are non-federal:

> 1st: The right of the City under its charter Sub. Sec. 3 of Sec. 4 of Act 159 of 1912; Sub. Sec. 12 of Sec. 1 of Act 93 of 1912) to open and keep open and free from obstruction its streets, and to authorize the use of them for railroads operated by horse, electricty, steam or other motive power, and to regulate the same.
>
> 2nd: That it was a valid exercise of the police power vested in the City of New Orleans.
>
> 3rd: That the Commission Council of the City of New Orleans, had power under the facts of the case, to cause the demolition of the viaduct; and that same was not an unreasonable exercise of the police power vested in it.

(IV)

It is well settled that this Court will not entertain jurisdiction in review of State judgments where, beside the

Federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained.

CASES DENYING JURISDICTION: The following decisions of this Honorable Court deny the jurisdiction of the appeal:

Blount v. Walker, 134 U. S. 607, 33 L. Ed. 1036.

Johnson v. Risk, 137 U. S. 300, 34 L. Ed. 683.

Cook County v. Calumet & C. Canal Dock Co., 138 U. S. 635, 34 L. Ed. 1110.

Wood Mowing Mach. Co. v. Skinner, 139 U. S. 293, 35 L. Ed. 193.

California Powder Wks. v. Davis, 151 U. S. 389, 38 L. Ed. 206.

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111.

Wills v. Crane, 150 U. S. 84, 37 L. Ed. 1007.

Browne v. Union P. R. Co., 266 U. S. 255, 69 L. Ed. 601.

White v. Leovy, 174 U. S. 91, 43 L. Ed. 907.

Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284.

(V)

It has also been decided by this Court, that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property, without compensation, or without due pro-

cess of law, in the sense of the 14th Amendment. The following cases support this view:

Chicago & A. R. v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204.

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.

New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. Ed. 831.

Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596.

(VI)

We are taking the liberty of quoting below decisions which we believe hold that the exercise of the Police Power, in the interest of public health, morals and safety, are questions which are purely local and should be decided by the lawmaking body and the Courts of each State.

"The protection of the health and morals, as well as lives, of citizens, is within the police power of the state legislature."

Holden v. Hardin, 169 U. S. 366, 42 L. Ed. 780.

"The decision of the highest court of a state that a municipal ordinance which is asserted violates the Federal Constitution, is within the city's charter powers, and is not forbidden, is conclusive on writ of error to the state court."

Hadacheck v. Sebastian, 239 U. S. 394, 60 L. Ed. 348.

"Whether certain municipal ordinances challenged as violating the Federal Constitution are within the power conferred by the legislature upon

the municipal corporation is a question of state law, the decision of which by the highest court is conclusive upon the Federal Supreme Court on writ of error to the state court."

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

CONCLUSION.

We, therefore, submit that this Court is without jurisdiction and that the appeal should be dismissed.

Respectfully submitted,

BERTRAND I. CAHN,
City Attorney;

WM. F. CONKERTON,
Asst. City Attorney,

For City of New Orleans, Appellee.

APPENDIX.

CITY OF NEW ORLEANS vs. NEW ORLEANS PUBLIC SERVICE INC.	No. 29,873 SUPREME COURT OF THE STATE OF LOUISIANA.

Appeal from the Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

OVERTON, J. This is a suit to force the defendant to demolish a viaduct, owned and used by it for the passage of its street cars at the intersection of Franklin Avenue and Florida Walk, over the tracks of the Southern Railway Company, and to require it to construct at that point, along Franklin Avenue, at grade, a double line of tracks, to take the place of the single track, built on the viaduct.

The viaduct was built for the purpose of avoiding crossing at grade, the tracks, now used by the Southern Railway Company. The grounds chiefly relied on for the demolition of the viaduct are, first, that it was not constructed in accordance with the ordinance authorizing or directing its construction, secondly, that as constructed it permits of the laying of but one railroad track on it, which is insufficient for the present needs of the people in the part of the city, served by the railway line, crossing it; and, thirdly, that by reason of decay and the failure to

keep it in proper repair, the viaduct has become dangerous and unsafe.

The defense is a denial that the viaduct was not constructed as directed; a denial that one railway track, at that point, is insufficient for the needs of that section of the city; a denial that the viaduct is unsafe; a plea that, to require defendant to cross the Southern Railway tracks at grade would introduce a grave hazard, which the viaduct, since its construction, has eliminated; and that to require the demolition of the viaduct would be to deprive defendant of its property without due process of law, in violation of the federal and state constitutions, and to impair defendant's contract rights with the city, in violation of Section 10 of Article 1 of the Constitution of the United States, and Section 15 of Article 4 of the Constitution of this state, and a denial to defendant of the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The viaduct, with the exception of the approaches, was constructed in 1910, under the authority of Ordinance No. 6445, New Council Series, adopted in that year, which directed that the viaduct be so constructed as to embrace earthen embankment approaches of such height and width as not to exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways thereon. The embankments for the approaches, leading up to the viaduct, were constructed in 1914. In 1926, petitions were addressed to the Commission Council of the City of New Orleans, asking, for various reasons, that the viaduct be demolished. The council caused an investigation to be made to ascertain

the condition of the structure. Two examinations were made to determine its condition. The report made to the council indicated that the viaduct was becoming unsafe, though not so much so as to require the immediate cessation of traffic over it. As a result of the report, the council passed Ordinance No. 9375 Commission Council Series, on November 17, 1926, ordering defendant to remove the viaduct, and ordering it to construct, operate and maintain a double line of tracks for the operation of its cars, at street level, along Franklin Avenue and across Florida Walk, the tracks to be constructed in accordance with plans and specifications to be prepared by defendant, and approved by the Commissioner of Public Utilities and the City Engineer of New Orleans, the removal of the viaduct to be completed within one year after the passage of the ordinance. The year elapsed with no effort on the part of defendant to comply with the council's order. This suit is virtually an effort to enforce compliance with the ordinance.

The viaduct is of trestle construction, or in other words, the track structure is built on piles. The first inspection made at the instance of the council, showed that the viaduct was in an unsafe condition, primarily on account of the condition of the bents, that is, the supporting structure, which support the stringers and the track structure itself. At this inspection it appeared that the condition of the bents varied considerably. Some were in a satisfactory condition, while others, which supported the spans, were considerably rotted, and in others, the piling that supported the caps, and in turn the track structure, had become rotten to such an extent as to leave nothing but a shell

of the former piling. As to the foundation on the river side the earth had subsided from the base of the pier to such a degree as to expose at least two or three rows of the piling that supported it. The front row of the piling had twelve piles, and of these, five had so rotted as to make them dangerous. As to the second and third rows, the engineer making the inspection, was unable, due to conditions, to inspect them, but felt that, as the piles there were exposed to the puddling action of rain water, which might seep under and not drain away, as was the case with the piling in the first row, that the same condition existed there as in the first.

Not many days later, though after the ordinance condemning the viaduct had been passed, a second inspection was made. It was then found that the conditions existing at the first inspection had been somewhat improved by defendant, by reason of the removal, at its instance, of certain of the bents considered dangerous at the first inspection, but it was found that other bents were still in a dangerous condition. The work of replacement was found to be satisfactorily done, save in two instances, where the replaced piling failed to make proper contact, but in those instances, the defective work had but little effect on the strength of the bridge. At this inspection ten bents on the riverside of the structure were found to be unsafe, and six on the Gentilly side, making a total of sixteen.

While the evidence offered by the defense shows that some of the piling was decayed, yet the tendency of the evidence offered by it is to the effect that the structure

at no time was in a dangerous condition, notwithstanding it had been weakened by decay.

Our conclusion is that the evidence does not justify us in holding that the structure may be properly regarded as safe, but, to the contrary, it should be regarded as unsafe, notwithstanding the repairs that have been made, although it is unlikely that there is immediate danger of a collapse.

The contention that the viaduct was not constructed according to the ordinance, authorizing or directing its construction, is based upon the contention that it is so built as to narrow the roadway by encroaching upon it, whereas the ordinance provides that the structure must be built approximately on the center line of Franklin Avenue, and so as not to exceed the neutral ground, nor obstruct the roadways on that avenue. The evidence shows that on the river side of the structure the construction is such as to maintain the correct width between curves, that is to say, a width of twenty-eight feet, but that at one point at the terminus of one of the embankments, the roadway has been narrowed from twenty-eight to eighteen feet. It is not unlikely, however, that this condition is due, not to improper construction by defendant, but to a taking by plaintiff of twelve feet of the roadway for a side walk, about the time that the roadway was paved. Granting this to be the case, it does not follow, however, that plaintiff is not entitled to regulate the right granted to cross Florida Walk, so as to obtain, if necessary, the required width for the roadway.

The contention that the viaduct should be removed, because it is so constructed as to admit of but one railway track on it, when there should be two over it, to serve properly that section of the city, served by the railway, crossing the viaduct, is scarcely sufficiently supported by the evidence to justify, of itself, the removal of the viaduct. The population of that section of the city, served by the railway line, has unquestionably considerably increased since the construction of the viaduct in 1910, and probably will continue to increase, but it does not appear to us that it has yet so increased as to call for the removal of the structure in order to provide for double tracks, though this may become necessary at some time in the future.

Plaintiff has power under its charter to open and keep open and free from obstruction its streets, and to authorize the use of them for railroads operated by horse, electricity, steam or other motive power, and to regulate the same. Sub Sec. 3 of Sec. 4 of Act 159 of 1912; Sub Sec. 12 of Sec. 1 of Act 93 of 1921. Plaintiff unquestionably has ample police power for the discharge of its functions, "including the power to enact and enforce all ordinances necessary for the protection of the lives and property, for the preservation of the health, and for the promotion of the comfort, convenience, and general welfare of its inhabitants, and including, specifically, the power to regulate the use of the streets and to maintain them in a safe condition." City of New Orleans v. LeBlanc, 139 La. 113, *119*, 71 So. 248.

We feel from the evidence before us that the viaduct, due to decay, is not in a condition, notwithstanding the re-

pairs made, that should be regarded as safe. Such being the case it is obvious that something should be done to correct the situation. The Commission Council reached the conclusion that the viaduct should be removed and grade crossings constructed in its place, consisting of double tracks. The council evidently did not consider that repairs would solve the problem. We are not prepared to say that the council, which is intrusted, within reasonable limits, with power to determine what should be done, has erred in ordering the removal of the structure, but think that the evidence justifies the action of that body. The viaduct has been there a number of years. The evidence of the City Engineer leads to the conclusion that, if repairs were undertaken, they would have to be substantial repairs, and rather extensive. If repairs were undertaken and proved to be adequate, they would doubtless result in leaving the roadway narrowed at the point indicated above, when the city should be in position to increase the roadway there to its proper width. Moreover, if the repairs proved to be adequate, they would perpetuate a viaduct, which is admittedly capable, due to its width, of accommodating only one railway track, when sooner or later, in all likelihood, another will be required. The city has power, under the facts of the case, to cause the demolition of the viaduct. Its action, in so directing, is not an unreasonable exercise of the police power. In changing the crossing from an overhead to a grade crossing it is fair to assume that the city will see that proper precautions will be taken to avoid accidents. By ordering the change made the city is not depriving defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, nor of Section 2 of Article 1 of the Constitution of

this state, nor is the city impairing the obligation of defendant's contract with it, in violation of the Constitution of this state and of the United States, for by ordering the removal defendant is legitimately exercising its police power, subject to which defendant holds its franchise. Chicago & Alton Railway Company v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204; City of Shreveport v. Kansas City, S. & G. Ry. Co. 167 La. —, 120 So. 290.

For these reasons, the judgment appealed from is affirmed.

FILE COPY

APR 21

CHARLES ELMORE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF THE CITY OF NEW ORLEANS, APPELLEE.

BERTRAND I. CAHN,
City Attorney;

WM. F. CONKERTON,
Assistant City Attorney;

FRANCIS P. BURNS,
Assistant City Attorney.

MONTGOMERY-ADL. WEE PRINTING CO. INC., 420-424 CHARTRES, N.O.

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(A)

The Jurisdiction of This Court.

[1] Laws and regulations in the interest of public health, safety and convenience are local in nature and should be decided by the law-making body and the Courts of each State; and when such questions are decided by the Highest Court of a State they are binding on this Court 6-7

[2] Where it appears from the record that not only the Federal questions raised by the appellant in its answer, there are other questions which are non-Federal in nature also presented, and the decision of the Highest Court of a State is based on the non-Federal questions which are sufficiently broad enough to maintain the judgment, the appeal should be dismissed 7-13

(B)

Does the State Court Decision Deprive Defendant of Its Property Without Due Process of Law?

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(C)

Is There Any Impairment of Defendant Contract Rights?

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(D)

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(E)

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(F)

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(G)

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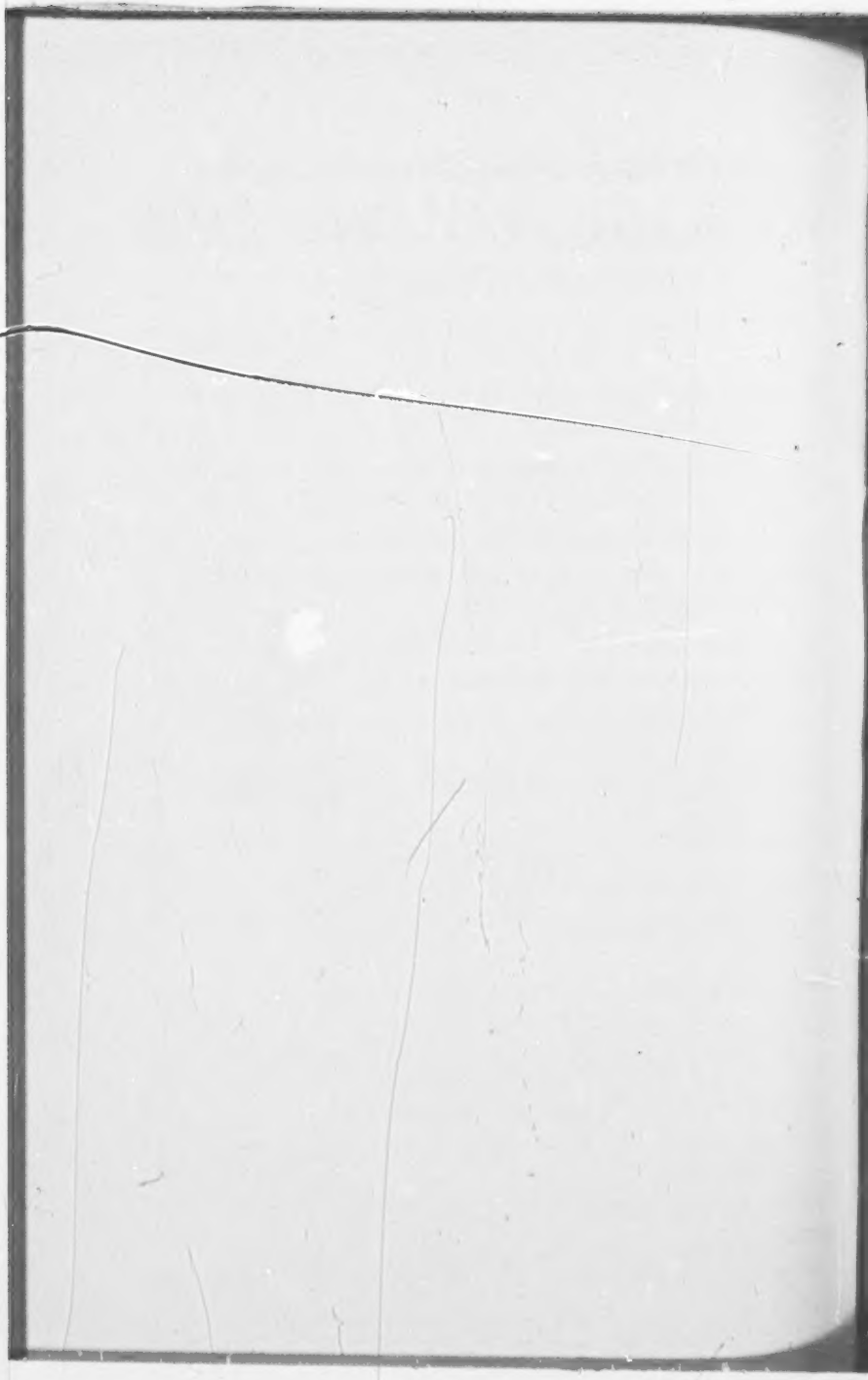

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE INC.,

Appellant.

On Appeal from the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF THE CITY OF NEW ORLEANS, APPELLEE.

(I)

NATURE OF THE CASE.

In the year 1910, the Council of the City of New Orleans passed Ordinance No. 6445, New Council Series, permitting the New Orleans Railway & Light Co., the predecessor of the N. O. Public Service Inc., appellant

herein, to construct a viaduct **"approximately on the center line of Franklin Avenue,** at, and in the vicinity of the Florida Walk intersection," the said viaduct by the terms of said ordinance **"to embrace earthen embankment approaches of such height and width as"** would **"not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways of said avenue."**

At the time of the passage and adoption of this ordinance, Franklin Avenue was not open, the streets were not paved and that section of the City of New Orleans served by the street car line traversing the said viaduct was very sparsely inhabited. Since that time (practically 19 years ago) that particular area or portion of the City of New Orleans has rapidly developed and has now become one of the thickly populated sections of the City. **Franklin Avenue has been opened and paved** and now carries a very heavy part of the travel and traffic of that section of the City, particularly the automobile traffic.

The New Orleans Public Service Inc., by Special Master's Deed, dated September 27th, 1922, in the matter *New York Trust Company v. New Orleans Railway & Light Co., No. 16,953, in Equity* (Consolidated Cause), in the United States District Court for the Eastern District of Louisiana, acquired the franchise granted to the New Orleans Railway & Light Co., under Ordinance No. 6032, New Council Series, which was an ordinance permitting the extension of the line which traverses and uses the viaduct herein referred to.

The Commission Council of the City of New Orleans, on November 17th, 1926, passed Ordinance No. 9375,

Commission Council Series (Record, p. 9), which required the New Orleans Public Service Inc. to remove the said viaduct and to complete the removal thereof within one year from the date of the passage of the Ordinance.

The New Orleans Public Service Inc., having failed to comply with the terms and provisions of said ordinance, the Commission Council of the City of New Orleans adopted a motion authorizing and directing the Mayor of the City of New Orleans to institute and prosecute a suit requiring the removal of the said viaduct in compliance with the provisions of Ordinance No. 9375, Commission Council Series.

(II)

THE PETITION OF APPELLEE.

The chief grounds relied upon by the City of New Orleans for the removal and demolition of the viaduct, as presented by its petition (Record, pp. 1-8), are the following:

1st: That it was not constructed in accordance with the ordinance authorizing its construction.

2nd: That as constructed it permits of the laying of but one railroad track on it, which is insufficient for the present needs of the people in that part of the city, served by the railway line crossing it.

3rd: That by reason of decay and the failure to keep it in proper repair, the viaduct has become dangerous and unsafe.

(III)

THE ANSWER OF APPELLANT.

The defense of the appellant, as shown by its answer (Record, pp. 10-17), is in effect a denial of the allegations of the petition, and the further plea that to require the demolition of the viaduct would be to deprive it of its property without due process of law, in violation of the Federal and State Constitutions; and, further, that such action would be an impairment of its contract rights; and, finally, that there is a denial to it of the equal protection of the laws, in contravention to the 14th Amendment of the Constitution of the United States.

(IV)

THE DECREE OF THE SUPREME COURT OF THE STATE OF LOUISIANA.

The decree of the Supreme Court of the State of Louisiana (Record, pp. 161-166) affirming the judgment of the Civil District Court requiring the removal and demolition of the viaduct, is based upon the following grounds:

1st: That the City had the right under its charter Sub. Sec. 3 of Sec. 4 of Act 159 of 1912; Sub. Sec. 12 of Sec. 1 of Act 93 of 1921, to open and keep open and free from obstruction its streets, and to authorize the use of them for railroads operated by horse, electricity, steam or other motive power, and to regulate the same.

2nd: That the City had ample police power for the discharge of its functions, "including the power to enact and enforce all ordinances necessary **for the protection of the lives and property for the preservation of the health, and for the promotion of the comfort, convenience and general welfare of its inhabitants,** and including, specifically, the power to regulate the use of the streets and to maintain them in a safe condition".

3rd: That the viaduct, due to decay, is not in a condition, notwithstanding the repairs made, that should be regarded as safe.

4th: That the city had power, under the facts of the case, to cause the demolition of the viaduct; and that same was not an unreasonable exercise of the police power vested in it.

5th: That the City is not depriving defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, nor of Section 2 of Article 1 of the Constitution of the State of Louisiana, nor was the city impairing the obligation of defendant's contract with it, in violation of the Constitution of the State of Louisiana and of the United States, for by ordering the removal the City was legitimately exercising its police power, subject to which defendant holds its franchise.

(V)

ARGUMENT.

(A)

THE JURISDICTION OF THIS COURT.

[1] Laws and regulations enacted in the interest of public health, safety and convenience of the inhabitants of a community are questions that are purely local in their nature and should be decided by the lawmaking body and the Courts of each State; and it has been held that such laws and regulations are within the exercise of the police power and the decision of the Highest Court of the State as to whether or not the enactment of such laws violates the Federal Constitution is binding on this Court.

> "The protection of the health and morals, as well as lives, of citizens, is within the police power of the state legislature."
>
> *Holden v. Hardin, 169 U. S. 366, 42 L. Ed. 780.*

> "The decision of the highest court of a state that a municipal ordinance which is asserted violates the Federal Constitution, is within the city's charter powers, and is not forbidden, is conclusive on writ of error to the state court."
>
> *Hadacheck v. Sebastian, 239 U. S. 394, 60 L. Ed. 348.*

> "Whether certain municipal ordinances challenged as violating the Federal Constitution are within the power conferred by the legislature upon the municipal corporation is a question of state law,

the decision of which by the highest court is conclusive upon the Federal Supreme Court on writ of error to the state court."

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

The 14th Amendment does not take away from the states those powers of police that were reserved at the time the original Constitution was adopted *(Mugler v. Kansas, 123 U. S. 623)*, it does not limit the subjects upon which the police power of a State may be lawfully exerted *(Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. Rep. 282)*, and it was not designed to interfere with the legitimate exercise of the police powers of the states to protect the lives, liberty and property of their citizens and to promote their health, peace, morals, education and good order. *(In Re Kemmler, 136 U. S. 449; Walker v. Pennsylvania, 127 U. S. 699; Powell v. Pennsylvania, 127 U. S. 678; In Re Converse, 137 U. S. 631).*

"In determining whether a municipal ordinance goes further than necessary to remedy the evil to be cured, this Court must, in the absence of clear showing to the contrary, accord good faith in the municipality."

Hadacheck v. Los Angeles, 239 U. S. 394.

[2] It will be observed from a consideration of the pleadings in the instant case, as well as the decree of the Supreme Court of the State of Louisiana, that aside from the Federal questions raised by the appellant in its answer, there were other questions presented for decision.

The Supreme Court of the State of Louisiana, as will appear from the opinion and decree of that Court, based its decision not alone upon the fact that the Ordinance requiring the demolition and removal of the viaduct, was a legal and valid exercise of the police power vested in the City of New Orleans and was not violative of the Federal and State Constitutions, but upon other questions which are non-Federal, to-wit: (1) The right of the City, under its charter, to open and keep open and free its streets; (2) That the City had ample police power for the discharge of its functions to enforce all ordinances for the protection of the lives and property for the preservation of the health, and for the promotion of the comfort, convenience and general welfare of its inhabitants; (3) That the viaduct, due to decay, could not be regarded as safe.

We submit, that the non-Federal questions upon which the Supreme Court of the State of Louisiana based its opinion and decree affirming the judgment of the District Court are broad enough to maintain the judgment requiring the removal and demolition of the viaduct.

> "Where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."
>
> *Browne v. Union Pacific R. Co., 267 U. S. 255; 69 L. Ed. 601.*
>
> *Hammond v. Johnston, 142 U. S., 73; 35 L. Ed. 941.*

"A Federal question is not presented to this court for review, although decided by the state court, if questions of a purely state character were passed upon by that court, which are sufficient to sustain its decree, wholly independent of the Federal question."

Castillo v. Mc Connico, 168 U. S. 674; 42 L. Ed. 622.

"Where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

Rutland Railroad Co. v. Central Vermont Railroad Co., 159 U. S. 630; 40 L. Ed. 285.

"A writ of error to a state court will be dismissed when the decision was based on a local or state question, and it is unnecessary to decide any Federal question."

White v. Leovy, 174 U. S. 91; 43 L. Ed. 907.

"Where a state decision rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

California Powder Works v. Davis, 151 U. S. 389; 38 L. Ed. 207.

"When a decision of a Federal question is rendered unnecessary by the view which the state court properly takes of the rest of the case, within

the scope of the pleadings, the state judgment is not open to review."

Wells v. Crane, 150 U. S. 84; 37 L. Ed. 1007.

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question has been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustis v. Bolles, 150 U. S. 361; 37 L. Ed. 1111.

"Where a case might properly have been determined upon a ground broad enough to support the judgment without resort to a federal question, this court has no jurisdiction."

Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293; 45 L. Ed. 193.

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been decided without deciding it."

Cook v. Calumet & Chicago Canal & Dock Co., 138 U. S. 635; 34 L. Ed. 1110.

Blount v. Walker, 134 U. S. 607; 33 L. Ed. 1036.

Adams v. Russell, 229 U. S. 353.

"Where the decree of the state court does not rest upon the State Statute in question, but upon independent grounds, it cannot be said that the decision of the state court was based upon the application of the Statute as a valid Act affecting the contract of plaintiffs in error and impairing its obligation."

"Where the Supreme Court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Hopkins v. McClure, 133 U. S. 380; 33 L. ed. 661.

"Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent grounds, and it appears that the court did, in fact, base its judgment on such independent ground, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one."

Klinger v. Missouri, 80 U. S. 257; 20 L. Ed. 635; (cited approvingly in *New Orleans Waterworks v. Louisiana Sugar Refining Co., 125 U. S. 18-38; 31 L. Ed. 611).*

"* * * But the answer to this is that when, as here, there can be no pretense that the court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any Federal question, this court accepts the decision, whether right

or wrong. Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 164, 61 L. ed. 644, 37 Sup. Ct. Rep. 318 * * *."

Nickel v. Cole, 256 U. S. 222.

We could go on almost indefinitely citing decisions of this Court, holding in line with the decision from which we have quoted above. Our examination of the jurisprudence on this question shows that it has been firmly adhered to for almost a century.

The authorities cited by appellant in their brief (pages 2, 3, 4 and 5) are not relevant to any issue raised by their appeal or by the City's motion to dismiss. We have never contended that this Court has no jurisdiction to determine the constitutionality of a City Ordinance. We contend that this Court is without jurisdiction in this case because the decision of the State Court of last resort has been predicated upon an issue, broad enough upon which to base a definitive judgment without the necessity of determining any Federal constitutional question that has been raised in the pleadings, by way of defense. It is our view and contention that the one question involved in this case is the question, *vel non*, of the right of the City Council to police its streets, and to pass such ordinances as may be necessary for the public safety, and the protection of lives and property of its citizens. If, in the exercise of such power, the Council determines, as a matter of fact, that the viaduct in this case is unsafe and orders its removal under the police power inherent in the Council, and if, after the trial of the issues involved on those particular facts, the Court of last resort of the State of Louisiana determines that the viaduct, as a matter of fact, is

unsafe, then this Court will not, under its well established jurisprudence, inquire into any question of fact so determined by the State Supreme Court. And this, although a Federal question may have been injected by the appellant because it matters not what rights the Company may, or may not have, under the Federal Constitution in connection with the ordinances in question, if the structure used in connection with the operation of its cars under its franchise be in point of fact, a menace to the safety and lives of the people of the City of New Orleans, and if, as a matter of fact, it be an obstruction of the public streets over which the City of New Orleans has unlimited police power. At this point we would again direct this Court's attention to the fact that the Supreme Court of the State of Louisiana has decided that the City of New Orleans has all the police powers that the State itself could exercise, over its streets and over the territorial limits of the City of New Orleans.

Le Blanc v. City of New Orleans, 138 La. 243 (70 So. 212).

State v. City of New Orleans, 151 La. 24 (91 So. 533).

Black v. City, 145 La. 180 (82 So. 81).

We submit, therefore, that the decree of the Supreme Court of the State of Louisiana, affirming the judgment of the District Court, being based upon questions which were non-Federal in their nature, and which in themselves were broad enough to maintain such judgment, this Court is without jurisdiction to review the judgment of the Supreme Court of the State of Louisiana.

(B)

DOES THE STATE COURT DECISION DEPRIVE DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW?

Of course, compliance with the ordinance would involve an expenditure of money; but so does compliance with regulations requiring a railroad to keep its roadbed and right of way free from combustible matter; to provide its locomotives with spark arresters; to provide cattle guards or the like. Such regulations, nevertheless, have always been sustained as being constitutional.

We do not believe that it can be seriously contended that the compliance with the ordinance for the removal of the viaduct would interfere with the exercise of the franchise for the operation of the street car line which traverses the viaduct sought to be demolished.

The ordinance requiring the removal and demolition of the viaduct was passed under the police power enjoyed by the City and in the interest of the safety and convenience of the public.

> "And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, in the sense of the 14th Amendment. Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 255; 41 L. Ed. 979, 991; 17 Sup. Ct. Rep. 581; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 462; 49 L. Ed. 831, 835; 25 Sup. Ct. Rep. 471; Chicago B.

& Q. R. Co. v. Illinois, 200 U. S. 561, 591; 50 L. Ed. 596, 608, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175."

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 77; 59 L. Ed. 1211.

"The imposition upon a railroad company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, does not amount to a taking of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution."

Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561; 50 L. Ed. 597.

"Neither the contract nor due process of law clause of the Federal Constitution prevents a municipal corporation from promoting the public health, safety, or general welfare by forbidding a railway company, through whose acquiescence a part of its right of way through the city not occupied by its tracks has by long use become the city's principal business street, to shift cars on the four block of such tracks which lie in the heart of the city except during certain specified hours, or to permit cars to stand within those blocks for a longer period than five minutes, and by requiring the tracks to conform to the street grade, and the spaces between the rails to be filled in except at street intersections—even assuming that the railway company has still a complete and unqualified ownership of the strip of land that was originally acquired in fee simple, and, as proprietor, may lawfully exclude the public therefrom."

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 547; 58 L. Ed. 721.

"* * * The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. Sayard v. Denny, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229 * * *."

Enterprise Irrig. District v. Farmers Mutual Canal Co., 243 U. S. 166; 61 L. ed. 649.

(C)

IS THERE ANY IMPAIRMENT OF DEFENDANT CONTRACT RIGHTS?

The franchise under which the defendant operates the street car line which traverses the viaduct was granted subject to the right of the City under its police power to control and regulate the same. Further than this the viaduct, as it presently exists, interferes with the free use of the street by the inhabitants of the City of New Orleans and more particularly is a hazard and menace to automobile traffic, by reason of the earthen embankment spreading into the street, causing a narrowing of the roadway on one side of Franklin Avenue from its normal width of 28 feet to 18 feet. Whatever right the defendant has is subject at all times to regulation by the City.

The City of New Orleans could not, under its charter, grant to the defendant an absolute right to the use of

the streets, for the reason that municipalities cannot barter away the rights which the inhabitants of the community enjoy and whatever rights the defendant may enjoy and exercise under its franchise is subject at all times to the regulatory power of the municipal authorities. Under the law of *Louisiana Civil Code, Article 454*, it is said:

> "Things which are for the common use of a city or other places, as streets and public squares are likewise public things."
>
> *Civil Code of Louisiana, Art. 454.*

> "Every reason of public policy requires that grants in the subservance of streets shall be held subject to reasonable regulations as the public health and safety may require. Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking of property without due compensation."
>
> *New Orleans Gas Light Company v. Drainage Commission, 197 U. S. 453; 25 S. C. R. 471; 49 L. Ed. 831.*

> "But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.
>
> "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or

general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. Ed. 721, 726, 34 Sup. Ct. Rep. 364, and cases cited. * * * "

" * * * The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the exercise of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations."

New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 460; 49 L. Ed. 834.

N. O. Gaslight Co. v. Louisiana Light, etc., Mfg. Co., 115 U. S. 650; 29 L. Ed. 517.

"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State within legislative control, in the exercise of which the Legislature is vested with a large discretion beyond the reach of judicial inquiry, if it is exercised *bona fide* for the protection of the public."

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677; 67 Sup. Ct. Rep. 714.

"The police power of a State is not confined to the suppression of what is offensive, disorderly or insanitary, but embraces regulations designed to

promote the public convenience or the general prosperity."

Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. Rep. 289.

As long ago as 1829, this Court recognized that a State, under its general police power, has authority to do any act not unconstitutional to enhance the value of property and to improve the health of its inhabitants. Thus, in *Willison, et al., v. Black Bird Creek Marsh Co., 6 Pet. 251*, it said:

> "The act of assembly by which plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states."

(D)

IS THERE A DENIAL TO DEFENDANT OF THE EQUAL PROTECTION OF THE LAWS?

We do not feel for a moment that defendant is at all serious in its contention, that the enactment of the ordinance requiring the removal of the viaduct, is a denial to it of the equal protection of the laws, and this is indicated by the fact that defendant in its "Statement of Points To Be Relied Upon" (Record, p 169) does not include this question as one of the points relied upon.

(E)

THE MERITS OF THE CASE.

We will take up and discuss in their order the defenses relied upon by the New Orleans Public Service Inc., in the order in which they have been made, and we believe that we can show that all of the defenses thus made are refuted by the record and the facts of the case.

1st: That its predecessor was required by the City Council to construct said viaduct for public safety.

To refute this defense it will only be necessary to refer your Honors to the terms and provisions of *Ordinance No. 6445, N. C. S.*, which says:

Ordinance No. 6445, New Council Series.

"Whereas the New Orleans Terminal Company has objected to the New Orleans Railway and Light Company crossing its tracks at grade on Franklin Avenue, at the intersection of Florida Walk, in connection with the franchise granted by the said New Orleans Railway and Light Company by Ordinance No. 6032, New Council Series, and

Whereas the general public interest will be best subserved by the said tracks not crossing at grade, but that the said tracks cross the tracks of the New Orleans Terminal Company on a viaduct; and

Whereas the New Orleans Railway and Light Company is satisfied to build such viaduct; therefore

Be it Ordained by the Council of the City of New Orleans, that the City Engineer be and he is hereby authorized to approve plans for a Viaduct

to be constructed by the New Orleans Railway and Light Company, approximately on the center line of Franklin Avenue, at, and in the vicinity of the Florida Walk intersection, the said Viaduct to embrace earthen embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways on said avenue."

Appellant's counsel (brief, page 37) states that the City's petition alleges "that Ordinance 6445, New Council Series, 'directed and required the New Orleans Railway & Light Company to construct.'"

While it is true that the petition makes this statement, it is equally true that Ordinance 6445, New Council Series, is annexed to and forms part of the petition, and under the jurisprudence of the Supreme Court of the State of Louisiana, any variations between allegations in the petition and documents annexed to and forming part thereof, are controlled by the documents themselves. It is obvious that the statement that the said ordinance directed and required the construction of the viaduct, was an error which escaped attention at the time the petition was filed.

We respectfully submit that the authorities supporting the statement of law above made, will be found in the jurisprudence of Louisiana as exemplified by the following cases:

"Documents annexed to a petition and made a part thereof control the averments of the petition founded upon them."

Lewy v. Wilkinson, 135 La. 105 (64 Sou. 1003).

Teutonia Bank v. Wagner, 33 La. An. 732.
State Ex Rel. Saint v. Louisiana Western R. Co., 18 Fed. (2nd) 645.

It will thus be observed for the very terms of the Ordinance that the City Council did not require the predecessor of defendant to construct said viaduct for any reason whatsoever but merely "permitted" them so to do.

2nd: That it was constructed at a cost of $58,000.00.

Even admitting for the sake of argument that the construction of the viaduct did cost $58,000.00, that does not prevent the City of New Orleans under its police power to require its removal on the ground that it is dangerous and a menace to life, and upon the further ground that it interferes with the free use of the streets.

Further, the figure given is the original cost of construction of the viaduct and no depreciation whatever has been taken into consideration; consequently, if depreciation was figured over the 19 years that the viaduct has been in existence the viaduct would be in the category of a liability rather than an asset valued at $58,000.00.

3rd: That it has been operated with due regard to safety.

It would take too much space to quote the abstracts from the testimony showing that the structure is anything but safe. The record reeks with incidents of the dangerous and hazardous condition of the viaduct. We quote below two excerpts from the testimony, and if there were no other evidence in the record but these two things, they alone, we

submit, would be sufficient reason for the removal of the structure because of its dangerous condition:

From the testimony of David W. Godat, connected with the City Engineer's Office, a witness for plaintiff:

Q. What about the foundation?

A. The foundation on the riverside, in connection with the foundation on the riverside, the earth has subsided away from the base of the pier, exposing at least two and possibly three rows of the piling which support it. The front row of piling has twelve piles and of those twelve piles eight of them—five of them were rotted to such a condition you could almost shake them apart with an ordinary wooden stick. There was, however, some small part left in the pile, but not sufficient to carry any real load at all. Now, we were unable to get into the second and third row of piling, but I would feel that the same conditions were present. In other words, the pile was exposed to the elements and to the puddling action of any rain water which might seep under and not drain away. (Record, p. 26).

Q. Did you in 1926 after your inspection consider that while you found these defects that the trestle was safe for the operation of cars there over?

A. There were two inspections made in 1926, one on October 31 and one on November 8. The first inspection was made by myself, Mr. Wyler and Mr. Cracroft. The purpose of the inspection, the limited time in which to make the inspection did not allow us a sufficient time to, oh, go into it as much in detail as we wanted, and for that reason the findings were referred to Mr. Vallas with the request that the street cars be stopped until such time as a joint investigation could be made in connection with the engineers of the Public Service, which request was granted, and a joint inspection

made by myself, Mr. Guillot and a party of men under the Public Service. The findings of the November 8th inspection, or the purpose of that inspection, was to ascertain how much danger existed in the piles which were called dangerous on the first inspection. Now, after the inspection I still—I wrote a second report in which the viaduct was considered as dangerous. In Mr. Vallas' absence the report was sent directly to Commissioner Hall.

Q. Now, does that report that the viaduct was dangerous, or did those findings consider that the whole viaduct was dangerous, I mean, now, for the purpose that you had in mind in stopping the cars?

A. No, sir, the findings, were such that would allow the street cars to operate. Wait a minute. I would like to think a minute—Yes, the inspection was such as to consider the viaduct safe temporarily for the operation of cars, and, as I remember it, I requested that men be posted at Bent 28, on the Gentilly end of the viaduct to observe those—that bent under the operation of the cars, because it was that bent more than any other which caused the condemnation of the viaduct itself. (Record, pp. 29-30).

From the testimony of I. C. Moll, an engineer in the employ of defendant, and called as a witness for defendant, we have the following:

"Q. Mr. Moll, did you examine the pilings under these pillars?

"A. I examined the pilings that could be seen from the outside.

"Q. What did you find?

"A. **I found them to be decayed,** but not to the extent that they are not able to carry their load. They are still able to carry all the load that they have to carry. (Record, p. 126).

"Q. How many did you see?
"A. Twelve.

"Q. Of those twelve that you saw, how many showed deterioration or rot?
"A. **All of them.**" (Record, p. 133).

In support of the correctness of the decisions of both the Civil District Court and the Supreme Court of Louisiana as to the fact that the viaduct was unsafe and therefore should be removed, we call the attention of this Court to the printed Transcript of the Record at page 153. Mr. Moll, a witness for the appellant, was asked:

Q. "Well were outside engineers employed?
A. "Yes sir.

Q. "Who were they?
A. "Professor Derickson was employed in December. (R. Fol. 205).

Q. "Professor Derickson is a recognized Engineer?
A. "He is, and since that time, Mr. J. Frank Kohlman made an inspection."

The name of Mr. Kohlman is incorrectly spelled. It should be "Coleman". This correction is made merely to identify the gentleman who is now President of the American Society of Engineers, and who has held other high offices of honor in various engineering societies. He is recognized as one of the foremost engineers of the Country. Professor Derickson is not only a recognized engineer, but is the Professor of Engineering at Tulane Uni-

versity at New Orleans, and is one of the outstanding men in his profession.

Neither of these gentlemen was placed on the witness stand by the appellants who had employed them for the purpose of making an examination and to report thereon, nor was any explanation given for their failure to testify.

It is elementary law, we believe, that the Court must assume that the report that these two eminent engineers made was unfavorable to the Company and supported the City's contention that, as a matter of fact, the viaduct was unsafe.

4th: That it is adequate and sufficient for the transportation of the users of the line.

There is considerable testimony on this point, the greater portion of which shows that because of the single track which crosses the viaduct there are numerous delays. This testimony shows that the viaduct does not provide sufficient and adequate transportation for the users of the line. It must be remembered that this viaduct was erected 19 years ago; as we say in our petition, and as we have shown by testimony, that section of the City was very sparsely inhabited. At the time of the construction of the viaduct it was sufficient for the needs of the people of the section of the City served by the line traversing the viaduct, but now that nineteen years have passed, the viaduct is not sufficient for the line that traverses it in order to give to the users adequate transportation.

5th: That there is no need to require the destruction of the viaduct, which would involve an expenditure of $135,000.00.

The City has shown that there is good and sufficient need for the demolition and removal of the viaduct, to-wit:

1st: That the viaduct as constructed and presently existing **"exceeds the neutral ground space on Franklin Avenue"** and it obstructs the roadway on Franklin Avenue by reducing the width on the lower side of Franklin Avenue from 28 feet to 18 feet in width; and this in itself constitutes a hazard to automobile traffic.

2nd: As an engineering fact, the viaduct has become so dilapidated and the supports, (particularly the piling under the concrete column), are so decayed as to render it unsafe and is therefore dangerous to life and limb and a menace to the safety of the users thereof and generally the public of the City of New Orleans.

3rd: That the viaduct, by reason of its very existence, has closed certain streets which intersect Franklin Avenue and destroys their free use.

To our mind, all of these things, or any one of them alone taken into consideration, show sufficient reason and need for the demolition of the Franklin Avenue Viaduct; and show a legitimate exercise of the police power vested in the City of New Orleans to require its removal.

Appellants urge in their brief that the expenditure of $58,000 for the construction of the viaduct and a necessary expected expenditure of $135,000 more to demolish

the same and construct their tracks at grade, is in effect, the taking of property without due process of law. The answer to this is that in the year 1922, after the New Orleans Public Service, Inc., had acquired all of the physical properties, rights, etc., of the New Orleans Railway & Light Company in the receivership sale conducted by the Federal District Court for the Eastern District of Louisiana, the New Orleans Public Service, Inc., as the successor of the New Orleans Railway & Light Company, surrendered all of its franchises previously held by the New Orleans Railway & Light Company, including the one under which the appellant operates a street car line over the viaduct involved in this case, and obtained from the City of New Orleans, under the provisions of Act #94 of 1921, an indeterminate permit to continue said street car operation over said viaduct. Under this indeterminate permit the City of New Orleans has absolute power, supervision and control over the operation of the street railways system in the City of New Orleans, and particularly with regard to traffic routes, etc. Under the terms of the Ordinance which was adopted by the Commission Council of the City of New Orleans granting said indeterminate permit, it was specially provided that all capital expenditures made by the New Orleans Public Service, Inc., for improvements, extensions and betterments in its street railway system, should go into the Rate Base of the Corporation, on which it is permitted to earn a lawful rate of return not exceeding 7½ per cent. Hence, it is manifest that any expenditure made for the construction of the viaduct, or for its demolition and removal, cannot be deemed to be a taking of property without due process of law.

6th: That there was no justification for the passage of Ordinance No. 9375, C. C. S.—which requires the removal of the viaduct.

The Commission Council of the City of New Orleans, after considering the facts regarding the structure relative to its: (1) Exceeding the neutral ground width; (2) Its dilapidated and dangerous condition; (3) The closing of certain streets intersecting Franklin Avenue found as a fact: That there were true and acting under their findings passed the Ordinance No. 9375, C. C. S., and that alone was sufficient justification for the passage of the Ordinance for the reason that, as has already been said in this brief, the power to control the operation of street railways, and to regulate them in the interest of public safety; the power to keep open and free from obstructing its streets—are all powers possessed by the City of New Orleans under its charter and a valid exercise of that power.

It is urged by appellant that there would really be no necessity for requiring the removal of the viaduct from the neutral ground, for the purpose of widening Franklin Avenue at that point, if the City had not reduced the width of the street by widening the sidewalk. We submit that it is entirely within the discretionary powers of the Council to determine whether or not the sidewalks of the City should be widened or not, and if, in the exercise of said discretionary power, it is deemed advisable so to do, then it must necessarily follow that the City can avail itself of the right to use the neutral ground portion of the street for the widening of the roadway. In other words, the City is not required to retain the narrow sidewalks in order not to inconvenience the New Orleans Public Service, Inc., in

its illegal use of the neutral ground area in excess of that originally permitted by the ordinance granting authority to construct the viaduct. This principle of law has been definitely decided. The general principle is well established that the legislative power of a city to control and improve the streets is unquestioned, and such power, when duly exercised by ordinances, will override any licenses previously given by which the control of a certain street has been surrendered to an individual or corporation. To this effect are the cases of:

Wabash R. Co. v. Defiance, 167 U. S. 97;
New York v. Squire, 145 U. S. 175;
Missouri v. Murphy, 170 U. S. 78;

and again, we insist that there is nothing in the franchise of the appellant that gives it control over any street, the most that it ever had under the franchise being the right to use the street for purposes of laying its tracks and operating its cars, and the ordinance involved in this litigation does not attempt to deprive the appellant of the right to continue the operation of its cars over that line of track.

The City of New Orleans, as previously stated in this brief, is vested with the exercise of absolute police power and supervision over the local public utilities, and its streets and public places, and over all matters affected by and subject to the police power of the State. This has been judicially determined by the Supreme Court of Louisiana in the following cases:

State v. City, 151 La. 24 (91 Sou. 533).
Le Blanc v. City, 138 La. Rep. 243 (70 Sou. 212).
Black v. City, 145 La. 180 (82 Sou. 81).

7th: That it is not a legitimate exercise of the police power of the City.

As we have already said, we do not believe the defendant is at all serious in its contention and we have fully discussed this point.

(F)

The case of the *Grand Trunk Western Railway Company v. South Bend, 277 U. S. 544*, cited by appellant, at pages 28 and 34 of their brief, has no application. In that case it was sought to compel the removal of one of two tracks for which a franchise had been granted. In this case, no attempt is made by the City to compel the removal of any track, or the discontinuance of any service over a designated route. It is merely an effort on the part of the City to compel the removal of a dangerous and unsafe structure over which the Company operates a line of track to the peril of the passengers.

The case of *Owensboro v. Cumberland Telephone Company, 230 U. S. 58*, (appellant's brief, pages 29-30), is likewise not applicable. An attempt was there made to compel the removal of telephone poles and wires, or the charging of a fixed sum for the maintenance thereof which would have had the effect of either removing the poles or seriously affecting the original franchise granted. There is absolutely no analogy between the facts of that case and the facts in the instant case.

Counsel for appellant state in their brief (page 29):

"In the case at Bar, the City is seeking to destroy part of the street car franchise by com-

pelling the removal of the Franklin Avenue Viaduct. The police power of a municipality cannot be used to revoke or repeal an ordinance under which property rights have been granted as in this case, and thus destroy such property rights."

It is well to remember that the franchises under which the Company operates its cars down Franklin Avenue do not grant them the right to operate over a viaduct, but merely the right to use the street, subject to the police power inherent in the City. The ordinance requiring the removal of the viaduct does not revoke or repeal in any manner, nor does not, in any manner, affect any franchise right to operate a street car line down Franklin Avenue. It merely requires the Company to operate the cars over a track constructed in a safe and proper manner.

(G)

There appears at several places in appellant's brief, particularly on pages 13 and 42, the insinuation, if not the direct charge, that the City Council of New Orleans ordered the removal of the viaduct in order to enhance property values, and for political purposes or motives. The insinuation is quite broad that the Council's motive was to court the favor of the inhabitants in that section who wanted the viaduct removed, rather than because the structure was unsafe. The answer to this is obvious. Both the Judge of the Trial Court and the unanimous decision of the Supreme Court held that as a matter of fact the evidence proved the structure to be unsafe.

We feel confident that the record does not disclose any evidence which justifies appellant's Counsel in making the charge or insinuation above referred to, which appears in their brief.

Furthermore, the question of motive is not before this Court. We believe it elementary that an ordinance which is passed by the Commission Council in the exercise of its police power, if not otherwise unconstitutional, cannot be set aside because of an improper motive. Neither could an ordinance adopted by the Council in violation of constitutional rights be sustained for the reason that it was adopted because of a praise-worthy motive on the part of the Council.

CONCLUSION.

In conclusion, we submit that the appeal of the defendant should be dismissed, since the decree of the Supreme Court of the State of Louisiana, which affirms the judgment of the District Court, is based on questions which are non-Federal and broad enough to support the decree and judgment.

In the alternative, we submit, that the City of New Orleans possesses power under its charter to control and regulate the operation of street railways; to open and keep open its streets and to regulate and control the use thereof; that in order to carry out these purposes it is authorized to pass and enforce all necessary ordinances; that *Ordinance No. 9375, C. C. S.*, is a legal and valid exer-

cise of the police power vested in the City of New Orleans; that the passage of the said Ordinance was in the interest of the public safety; that the City of New Orleans, through its Commission Council and the Supreme Court of the State of Louisiana, are the sole judges of the safety of the viaduct structure and of what is needful and proper for the safety of the inhabitants of the City of New Orleans; that, therefore, the decree of the Supreme Court of the State of Louisiana is correct, and should be affirmed.

Respectfully submitted,

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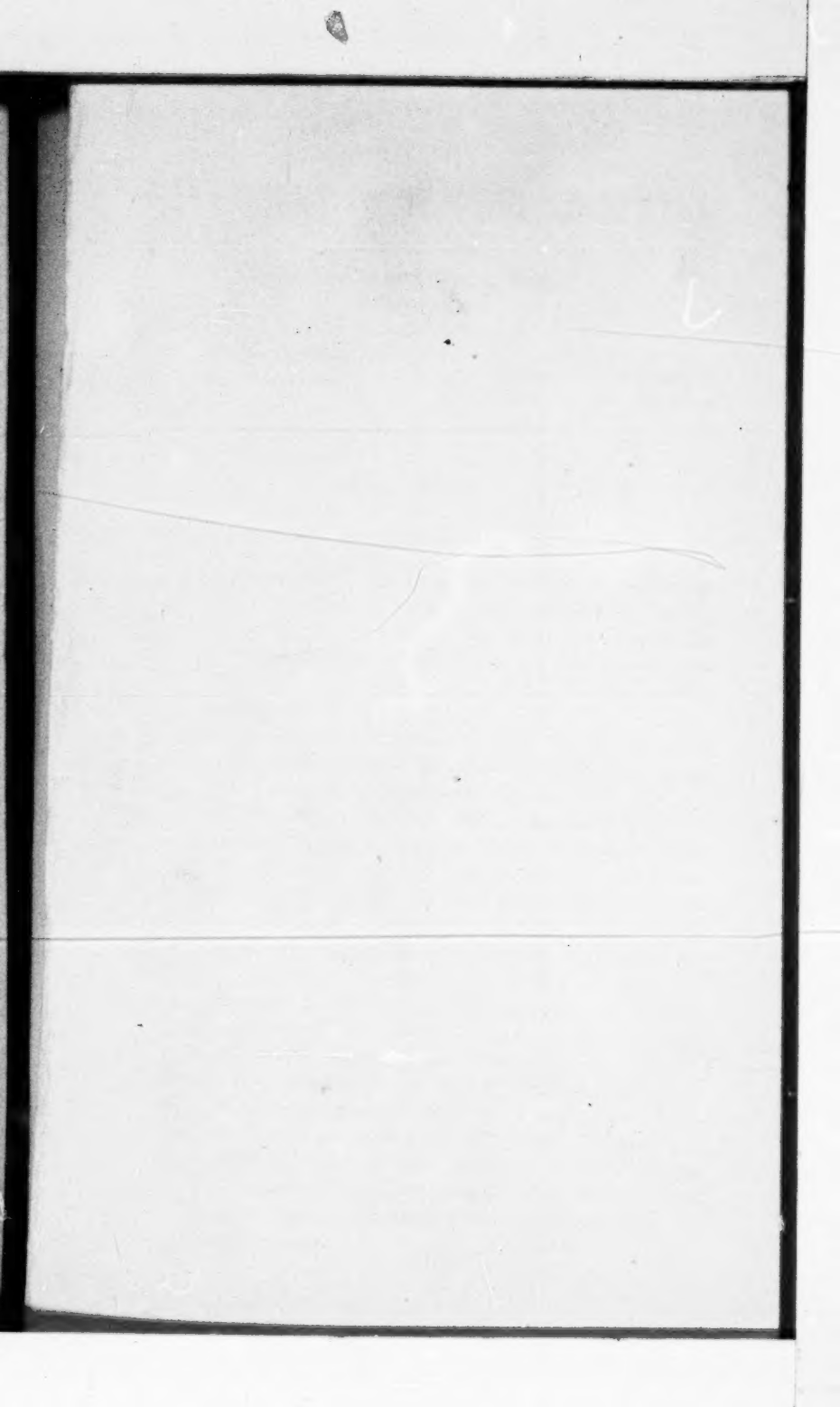

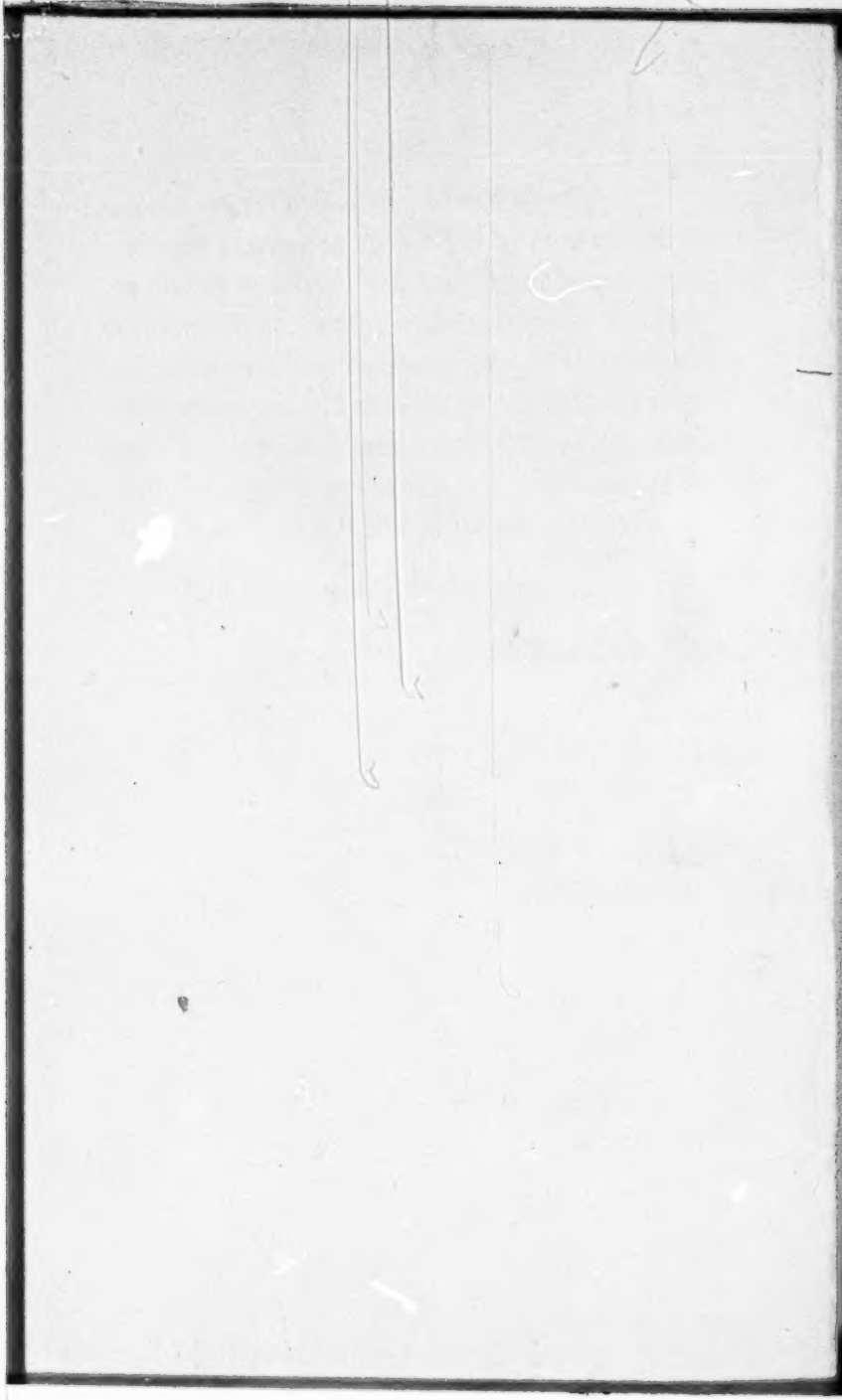

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1929.

New Orleans Public Service, Incorporated, Appellant, *vs.* City of New Orleans. } Appeal from the Supreme Court of the State of Louisiana.

[June 2, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

The question presented by this appeal is whether an ordinance of the city of New Orleans requiring the demolition of a viaduct and construction of grade crossings to take its place violates the contract clause of the Federal Constitution or the due process clause of the Fourteenth Amendment. 28 U. S. C., § 344(a). *King Mfg. Co.* v. *Augusta*, 277 U. S. 100.

Appellant has a franchise granted by the city for the operation of a street railway system. One of its lines was constructed along Franklin Avenue. That street intersects Florida Walk which is occupied by eight railroad tracks now used by the Southern Railway Company. March 9, 1910, the city passed Ordinance 6445. It recited that the railroad company objected to the street railway crossing its tracks at grade, that the public interest would best be served by a viaduct crossing and that the street railway was willing to build one. It authorized the city engineer to approve plans for a viaduct to be constructed approximately on the center line of Franklin Avenue and to embrace earthen embankment approaches that would not exceed the neutral space in Franklin Avenue or obstruct the roadways on either side of it. Following the adoption of the ordinance the company built a single-track trestle viaduct which has since been maintained and used for the passage of its street cars over the railroad tracks. November 7, 1926, the city passed Ordinance 9375 requiring appellant to remove the viaduct and to construct in its place double tracks at street level across the railroad tracks. Appellant refused and the city brought this suit to compel compliance.

The complaint alleges: Because of increase of population, the single track is not sufficient to provide adequate service for the people of that section. The viaduct has not been properly maintained and is dangerous to the public. In order to eliminate grade crossings where Franklin Avenue intersects the railroad tracks of the Louisville and Nashville Railroad Company, it would be necessary to demolish the present viaduct and to construct across the tracks of both railroad companies a new viaduct for two street-railway tracks, two vehicular roadways and two walks for pedestrians. The city would have to contribute one-half the cost of such construction (Act 38 of 1924) and it is not financially able to do so at the present time. The answer denies that the single track viaduct is not sufficient to furnish adequate service or that it is unsafe. It avers: The ordinance required the construction of the viaduct; it cost approximately $58,000, and its purpose was to avoid having grade crossings over much used railroad tracks. New crossings are not necessary. They will cost more than $135,000 and subject users to hazards the viaduct was constructed to avoid. The ordinance is arbitrary and violates the contract clause of the Federal Constitution and the due process clause of the Fourteenth Amendment. The trial court, without making any specific findings of fact, entered a decree for the city; the supreme court affirmed. 168 La. 983.

Appellant cites *Grand Trunk Western Ry.* v. *South Bend*, 227 U. S. 544, and *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, in each of which this Court condemned a city ordinance as repugnant to the contract clause. In the former the ordinance attempted to repeal a valid grant of a right to use a street for a railroad purpose that was found not to be injurious to the public In the latter the ordinance purported to require the telephone company to remove from city streets its poles and wires which had been placed there under authority granted by an earlier ordinance or to make payments not provided for in the contract under which the telephone lines were constructed. Neither of these cases has any application here. The ordinance now under consideration does not aim to destroy or to exact payment for the right of appellant to use the street for the operation of its street railway. It purports merely to regulate the use of the streets for the convenience and safety of the public. It does not impair appellant's franchise.

The ordinance is presumed to be valid and the burden is upon the appellant to show that, having regard to the facts disclosed by the record, removal of the existing viaduct and construction of the crossings are so clearly unreasonable and arbitrary as to amount to the depriving of appellant of its property without due process of law. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447, 448. Undoubtedly the city, acting as the arm of the State, has a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances. *Terrace* v. *Thompson*, 263 U. S. 197, 217. *Denver & R. G. R. R. Co.* v. *Denver*, 250 U. S. 241, 244. Regulations that are in principle fairly comparable to the ordinance under consideration have been sustained by this Court as within the scope of the police power.*

Ordinance 6445 merely authorized the street railway company so to use the streets. No element of coercion was involved. The opinion of the supreme court shows that one of the roadways has been narrowed by the city's construction of a sidewalk and, granting that the track is not presently inadequate, indicates that additional capacity for service at this intersection is likely to be needed. And, upon sufficient evidence, the court found that the viaduct is unsafe and that extensive repairs are required to put it in proper condition.

The value of the viaduct to be removed, the large expenditure involved for construction of the crossings in its place, and the dangers incident to their use constitute the sole basis of fact on which the ordinance is assailed. It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 251. *C. B. & Q. Railway* v. *Drainage Comm'rs.*, 200 U. S. 561, 594. *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67, 77. The sacrifice of the old structure and the cost of the new crossings involve a large amount of money. But the evidence fails to show that, having regard to the circumstances,

*Denver & R. G. R. R. Co. v. Denver, 250 U. S. 241. Chi., Mil. & St. P. Ry. v. Minneapolis, 232 U. S. 430. Mo. Pac. Ry. v. Omaha, 235 U. S. 121. N. Y. & N. E. Railroad Co. v. Bristol, 151 U. S. 556. Baltimore v. Baltimore Trust Co., 166 U. S. 673. New Orleans Gas Co. v. Drainage Comm., 197 U. S. 453.

it is so large that the regulation must be held to pass the limits of reasonable judgment and amount to an infringement of the right of ownership. While the elimination of grade crossings is desirable in the interest of safety, there are other means that reasonably may be employed to safeguard against collisions at intersections of public streets and railroad tracks. Presumably the city will make and enforce appropriate regulations at this crossing. Appellant has failed to establish facts sufficient to require a finding that under conditions existing there it is not reasonably possible so to do. And it has not shown that the ordinance is so unreasonable that it transgresses constitutional limitations.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.